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THE INSTITUTE OF BANKERS.

Legal Decisions affecting Bankers

VOL. II.—1900-1910.

EDITED AND ANNOTATED BY

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BARRISTER-AT-LAW.

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PREFACE TO VOLUME II.

The first volume of "Legal Decisions affecting Bankers," published in 1900, has, in the opinion of the Council of the Institute, proved of sufficient usefulness to bankers to justify the issue of this second volume, containing a selection of the cases reported since that date.

The work of editing and annotating the cases has again been entrusted to Sir John R. Paget, Bart., K.C., *Counsel to the Institute, to whom the Council is much indebted for his valuable services. They have further to acknowledge the assistance of Mr. E. H. Barchard, of Messrs. Janson, Cobb, Pearson & Co., Solicitors to the Institute.*

The Council have again to express their obligations to the Council of Law Reporting, to the proprietors of "The Times," and others for the permission given to make use of their reports, to which references are in each case appended.

October, 1911.

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6. Bissell and Co. *v.* Fox Brothers and Co. Vol. I, page 67. With reference to the note at page 69 it has been held that a collecting banker cannot obtain any protection by crossing to himself a cheque which reaches him uncrossed, *see* Capital and Counties Bank *v.* Gordon, Vol. II, page 35.

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8. Bank of England *v.* Vagliano Brothers. Vol. I, page 130. *See* Vinden and Rodgers *v.* Hughes, Vol. II, page 81, and North and South Wales Bank *v.* Macbeth, Vol. II, page 168 (fictitious payee).

9. Mathews *v.* Williams Brown and Co. Vol. I, page 200. The decision of the Court of Appeal referred to in the note, Great Western Railway *v.* London and County Bank, was overruled by the House of Lords, *see* Vol. II, page 10.

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Legal Decisions affecting Bankers.

VOLUME II.

[IN THE COURT OF APPEAL.]

RICHARDSON *v.* STORMONT, TODD & CO., LTD.

1900. Reported. [1900] 1 Q.B. 701.

Rules of Stock Exchange—Default—Vesting of Defaulter's Property in Official Assignees.

THE plaintiff was the official asignee of the Stock Exchange. One Reavely had been declared a defaulter on the Stock Exchange. Rule 176, now Rule 153 of the Rules of 1906, was and is that, in such event, "the official assignee shall collect and pay the assets into such bank and in such names as the Committee may from time to time direct and the same shall be distributed as soon as possible."

The matters at issue between the parties involved the question whether this rule comprised the whole of the defaulter's assets and property, or merely his Stock Exchange assets.

The Court of Appeal, affirming Mathew, J., upheld the former construction.

The following judgments were delivered:—

A. L. Smith, L.J.: The questions in the case turn upon the true construction of the rules of the Stock Exchange, Nos. 174 to 176. Rule 176 provides that the official assignees "shall collect and pay the assets" of a defaulter "to the credit of their joint account at a banker's, and shall distribute the same as soon as possible." The first question is, what is the meaning of the words "the assets" in that rule? One view suggested is that the meaning of the rule is that the assignees are to collect only the Stock Exchange assets of the defaulter, *i.e.*, the debts due to him on the Stock Exchange. It must be observed in the first place that there are no words importing any such limitation of the rule.

The words "the assets" *primâ facie* mean all the assets. Is there any authority to guide us as to the meaning of the rule? The case of Tomkins *v.* Saffery, 3 A.C., 213, if not a decision on the point, affords at any rate a strong indication of opinion on the part of three of the noble Lords who decided it, to the effect that the words "the assets" as used in this rule mean the whole of the defaulter's property. . . . . .

Having regard to what was said in that case, and to the fact that there are no words in the rule to limit the *primâ facie* meaning of the words "the assets," I come to the conclusion that the meaning of the rule is that the assignees are to collect all the assets of the defaulter and distribute them among his creditors upon the Stock Exchange.'

Collins, L.J.: I am of the same opinion. I agree entirely with the conclusion of Mathew, J., and the grounds upon which it was based. The case seems to me ultimately to resolve itself into a very small point, namely, what is the effect of the Stock Exchange rule? Did it either by itself or coupled with what was done afterwards under it constitute a *cessio bonorum* on the part of Reavely with regard to all his assets? It is not necessary for this purpose that there should be a legal assignment; an equitable assignment will suffice. If the operation of the rule was to produce a *cessio bonorum*, then there is an end of the first point suggested, namely, that the rules of the Stock Exchange only contemplate what have been called Stock Exchange assets. That view also gets rid of the second point, namely, that the rule only gives the official assignee authority to collect the assets as agent for the defaulter. In the case of Tomkins *v.* Saffery there seems to me to have been not merely an expression of opinion, but an actual decision on the part of two noble Lords, namely, Lord Cairns, L.C., and Lord O'Hagan, to the effect that the operation of the Stock Exchange rules was in that case to constitute a *cessio bonorum* by the defaulter, and on that ground there was an act of bankruptcy; and, although Lord Blackburn did not in terms decide that the effect of the rule was of itself to constitute a *cessio bonorum*, he appears to have been of opinion that, if there was an intention that the whole of the assets should be transferred to the official assignee under the rule and an actual transfer of part in pursuance of that intention, there would be what was equivalent to a *cessio bonorum*, and so an act of bankruptcy. If it were necessary to deal with this case looking only to the opinion expressed by Lord Blackburn, I think that the view which he took would be applicable; for in the present case I think there was an intention under the rule that all the assets of Reavely should be transferred to the official assignee, and part of them was actually transferred to him.

Romer, L.J.: I agree. The first question raised in this case is whether "the assets" of the defaulter contemplated by the rules of the Stock Exchange are limited to a particular class of assets or include all his assets. I think that upon the true interpretation of Rule 176 it applies to all the assets of the defaulter. It is significant that the group of rules of which that rule is a member is headed "Official Assignees," and that Rule 174 makes it the duty of the official assignees to manage "the estate" of the defaulter in conformity with the rules, regulations, and usages of the Stock Exchange. There is nothing whatever in the context to cut down the generality of the term "the assets" as used in Rule 176. I therefore think that it must have its natural meaning and be taken to include all the assets. It has already been pointed out that substantially this point has been disposed of by observations made in the House of Lords in the case of Tomkins *v.* Saffery. There was an attempt to suggest that there was no consideration for such an agreement with regard to the defaulter's assets, but that suggestion will not bear a moment's reflection. Each member of the Stock Exchange becomes a member on the footing that he will observe the rules, and there is ample consideration for their enforcement against any person so becoming a member.

The next question which arises is as to the rights of the official assignee under the rule. In my opinion he stands by virtue of it in the position of an equitable assignee of the assets of the defaulter.

Appeal dismissed.

Note.—The method by which declared default on the Stock Exchange operates as an equitable assignment of the defaulter's property for the benefit of a particular class of his creditors, is, as explained in this case and in Tomkins *v.* Saffery, 3 A.C., 213, that on entering the Stock Exchange a member signifies his adherence to and becomes subject to the rules of that institution. On his default, the rules, including Rule 153, operate as an assignment on his part of all his assets to the official assignees.

This is an act of bankruptcy, see Tomkins *v.* Saffery, *ubi sup.*, and the assignment is void as against outside creditors if bankruptcy follow within three months. Rule 157 of the Stock Exchange rules provides that "a claim which does not arise from a Stock Exchange transaction cannot be proved against a defaulter's estate."

Of course this refers only to the distribution by the official assignees: and in no wise affects the rights of outside creditors. Even those who have participated in the distribution by the official assignee are not debarred from suing for the balance of

their debt, or instituting bankruptcy proceedings against the defaulter. Mendelssohn *v.* Ratcliff and Another, 1904, A.C., 456.

It therefore behoves outside creditors, when a stockbroker is declared a defaulter, to take steps to protect their interests within three months, during which period, presumably, the official assignee retains control over the assets he may have collected.

Although the default operates as an equitable assignment by the defaulter to the official assignee, the fact of its also constituting an act of bankruptcy affords ample ground for a creditor refusing to pay to the official assignee, or anyone holding security refusing to deliver the same to him, until the period for which such act of bankruptcy is available has elapsed. Ponsford *v.* Union Bank, 1906, 2 Ch., 444.

And the defaulter himself is incapable of giving a good discharge for any debt due to him or property belonging to him at the date of the implied assignment. Such inability enures after the period during which the assignment is available as an act of bankruptcy, since it cannot then be impugned.

In re DE POTHONIER. DENT *v.* DE POTHONIER.

1900. Reported. [1900] 2 Ch. 529. Journal, Vol. XXII, p. 69.

Trustees—Investment—Convertible Securities—Bearer Bonds—Custody—Bankers.

This was an application by three of the trustees of the will of C. G. S. de Pothonier for directions as to the safe custody and control of bonds and debentures transferable by delivery and held by them on the trusts of the said will.

The testator, who died in December, 1899, after appointing his wife and the three plaintiffs executors and trustees, and giving numerous specific and pecuniary legacies, gave the residue of his real and personal estate to his trustees "upon trust to realise and convert the same into money with such powers and discretions as if they were absolute owners thereof, and with power to continue all investments made by me, and generally to manage and deal with my estate and the realisation and postponement of realisation thereof as they in their absolute discretion may think fit;" the residuary estate was then settled upon trust for the benefit of the testator's wife for her life or widowhood, his only daughter for her life, with remainder to her children or issue. The will also contained the following clause: "As regards all moneys subject to investment under my will my trustees are to have full power to continue all investments made by me whether of a nature authorised for investment or not without incurring any responsibility."

A large portion of the estate of the testator was at the time of his death invested in bonds of American railroads payable to bearer with coupons for dividends attached; it was considered desirable, as the trustees were expressly authorised so to do, to retain about £50,000 worth of these investments, and the trustees proposed to deposit these and other bearer bonds with the Union Bank of London, Limited, with whom it was intended to keep the banking account of the trust estate, but, having regard to the judgment in Field *v.* Field, 1894, 1 Ch., 430, as to the duty of trustees holding bonds and certificates payable to bearer, the present summons was taken out. The widow and the infant daughter were defendants.

Affidavits by two well-known bank managers, as to the practice

prevailing in the City of London amongst bankers and their customers with regard to the custody of bonds of foreign governments or of railroad or other companies payable to bearer, were filed, which stated as follows—

"It is a common practice of investors to deposit such bonds with their bankers upon a simple acknowledgment by the bankers of the receipt thereof. In such cases the bankers accept the deposit subject to such responsibility as is imposed upon them by law for their safe custody, and they collect the coupons for their customers, and credit them to the account of the customers as and when received. From my own knowledge of the course of business in the City, I say that it is a very common practice amongst men of business, and joint stock companies who hold large quantities of bonds, to deposit them with their bankers upon the above terms, and I believe that such practice offers to the owner of the bonds as good a security for the safe and proper custody of such bonds as can be obtained, and is at the same time the most convenient course the bond-holder can adopt as regards the collection of interest on the bonds. If bonds to bearer are deposited with bankers in a locked box or other closed receptacle, the bankers do not give any receipt for the bonds, but only a general acknowledgment of receipt of the box, and decline to accept any responsibility for its contents."

Cozens-Hardy, J.: The law does not impose upon trustees more than the exercise of that ordinary care and diligence which a competent and prudent man of business would exercise in his own affairs: that is settled by Speight *v.* Gaunt, 1883, 9 App. Cas. 1.

Now here the testator has done that which, speaking for myself, I think an extremely imprudent thing. He has authorised the retention of bearer securities, and one of the trusts of the will is to deal with these bearer securities, which are securities with coupons attached which have to be cut off at regular periods. It is idle and ridiculous to say that securities of that nature must be kept in a box with four keys, not to be opened to cut off the coupons except when all four trustees are present together. That is not a businesslike transaction in a matter of this kind. I think the trustees are perfectly justified in dealing with American bonds and securities of this nature in the way which is customary among prudent men of business. As I understand, the trustees have a current trust account with their bank. The bankers are well-known bankers. It is the ordinary usage of bankers, with whom bonds of this nature are deposited, to discharge the duty of cutting off the coupons when due, collecting them, and placing the amount to the credit of the customer's account. I think the trustees would be perfectly justified in depositing the bonds with the bankers upon those terms, which will not justify the bankers

in parting with the bonds except under the authority of all the trustees, but will justify the bankers in cutting off the coupons and collecting them as and when they are due, in the ordinary course. This seems to be entirely in the spirit of, if not sanctioned by the express language of Wood, V.-C., in Mendes *v.* Guedella, 2 J. & H., 259, and I do not think that Kekewich, J., in Field *v.* Field, 1894, 1 Ch., 430, really intended to depart from that. I observe that Mendes *v.* Guedella, 2 J. & H., 259, was not cited to Kekewich, J., and he was directing his mind to the question whether trustees ought to allow bonds of this nature to remain in the hands of a solicitor. That I should unhesitatingly answer in the negative. It is no part of a solicitor's duty to cut off these coupons and collect them, while it is part of the duty of the banker. My judgment is that it is part of the duty which he undertakes for his customer. The order should, I think, be in this form: The plaintiffs and the defendant Mrs. de Pothonier may be authorised to deliver the bonds and debentures to the Union Bank of London, Limited, to be deposited in their joint names, for safe custody and for the collection of coupons so long as the bank acts as the bankers of the trustees.

[IN THE COURT OF APPEAL.]

LONDON AND COUNTY BANKING CO., LTD., *v.* NIXON.

Reported. [1901] 2 Ch. 231. Journal, Vol. XXII, p. 330.

Breach of Trust—Mortgage—Priorities.

On August 14th, 1897, F. T. Tasker, a solicitor, deposited with the bank five mortgage deeds relating to real property, and charged in their favour all his interest in the property as security for all money due from him to the bank. By the same document he undertook, on request, to execute a legal mortgage to the bank or their nominees, and declared that he would hold his interest thereby charged in trust for the bank as mortgagees. He further irrevocably appointed certain officials of the bank as attorneys to execute such further mortgage.

By deed dated April 5th, 1898, and made between Tasker of the one part and the bank of the other part, executed by officials of the bank as Tasker's attorneys, the mortgage debts were assigned by Tasker to the bank, and the mortgaged property was conveyed to the bank as security for the money secured by the charge of August 14th, 1897.

The five mortgages, in fact, formed part of the funds of a marriage settlement, of which Tasker was a trustee. From 1890 to 1895 he was sole trustee, but in the latter year Nixon was appointed his co-trustee. In March, 1898, Tasker absconded and was made bankrupt. When the original charge was executed the bank had no notice that Tasker was a trustee, but they had received notice before the execution of the mortgage of April 5th, 1898. Both parties claimed priority over the other, and Farwell, J., held that the trustees of the settlement were entitled to priority over the bank.

The bank appealed.

Lord Justice Stirling read the judgment of the Court and said that the priorities were governed by the rules applicable to interests in land, and the first point to determine was the state of the legal title. Prior to August, 1897, this was vested in Tasker and Nixon as joint tenants. The deed of April, 1898, being executed by officials of the bank as Tasker's attorneys was as effectual as

though executed by Tasker himself, and severed the joint tenancy of Tasker and Nixon, so that an undivided moiety of the mortgage terms became vested in the bank, the other moiety remaining vested in Nixon. The legal estate was not got in by the deed of 1897. Before the execution of the 1898 deed the bank had notice that Tasker had made himself, together with Nixon, an express trustee of the mortgages for the beneficiaries under the settlement, and it was inequitable for the bank to get in the legal estate as against Nixon and the beneficiaries, and they could gain no priority thereby.

Appeal dismissed.

Note.—It was stated by counsel for the bank that when the deed of April 5th, 1898, was executed, the directors were advised that it would give the bank protection only as against claims of which they had at that time no notice, and therefore not as against the persons interested under the Tasker settlement, of which they had notice.

[IN THE HOUSE OF LORDS.]

GREAT WESTERN RAILWAY COMPANY *v.* LONDON AND COUNTY BANKING COMPANY.

1901. Reported. [1901] A.C. 414. Journal, Vol. XXII, p. 387.

Bills of Exchange Act, 1882, Sec. 82—What constitutes a Customer.

In this case the important question was involved of what constitutes a "customer" of a bank within the meaning of Section 82 of the Bills of Exchange Act, 1882, which provides that when a banker in good faith and without negligence receives payment "for a customer" of a cheque crossed generally or specially to himself, and the customer has no title or a defective title the banker shall not incur liability to the true owner. This appeal was from an order of the Court of Appeal dated June 21st, 1900, reported, 1900, 2 Q.B., 464, dismissing the appeal of the appellants against a judgment of Mr. Justice Bigham, reported, 1899, 2 Q.B., 172, dated June 22nd, 1899.

The action was commenced by the appellants as plaintiffs against the respondents to recover "the sum of £142 10s., money had and received to the use of the plaintiffs, or in the alternative for the wrongful conversion by the defendants of a cheque of the value of £142 10s." On November 16th, 1898, one Noble Huggins, by falsely pretending that a poor-rate had been made, and that he, as assistant overseer, was entitled to receive the same, obtained from the appellants a cheque of the value of £142 10s., with intent thereby to defraud. Of this misdemeanour he was duly convicted. The cheque was drawn in favour of Noble Huggins or order, as payee, on the London Joint Stock Bank, Princes Street, London, and was crossed "and Co.," and bore on it the words "not negotiable." Huggins, on November 16th, 1898, offered the said cheque for cash to the branch bank of the respondent company at Wantage, in the county of Berks, who took the same and gave him the sum of £117 10s. in notes and gold. The balance, £25, was not paid in cash to Huggins, but was held by the manager of the respondents' said branch bank, in his capacity as treasurer of the Wantage Rural District Council, at the request of Huggins, in discharge of his liability to

the council. The cheque was presented by the respondents on November 17th, 1898, at the London Joint Stock Bank, and payment was made on behalf of the appellants. Upon the discovery of the fraud the appellants demanded the proceeds of the cheque, and after refusal commenced this action. Huggins never had any banking account with the respondent company. It appeared, however, that he had during many years previously taken cheques received by him from various ratepayers to the respondents' branch bank at Wantage and received cash in exchange therefor. The appellants, in fact, had no knowledge of these transactions, nor was there any evidence that they had such knowledge. In their defence the respondents alleged that Huggins was a customer of theirs. They also alleged that they gave value for the cheque in good faith and without negligence, and without notice that Huggins had a defective title to it. It was contended by the appellants that Noble Huggins was not (so far as regards this transaction, nor at all) a customer of the respondents within sec. 82 of the Bills of Exchange Act, 1882, and even if he was a customer, that the respondents did not receive payment of the cheque for a customer within the section, but that the appellants' money was obtained in payment of the cheque by the respondents for themselves as holders of the cheque, for which they had given value to a person who was not capable of giving a better title than he had himself. The action was tried before Mr. Justice Bigham, without a jury, on June 16th, 1899. Mr. Justice Bigham gave judgment for the respondents, the bank, with costs, upon the ground that they received payment of the cheque in good faith and without negligence, and that they so received payment for Huggins and not for themselves, and that as Huggins was a customer of the bank within the meaning of sec. 82 of the Bills of Exchange Act, 1882, the respondents were protected by that section. The Court of Appeal on June 21st, 1900 (Vaughan Williams, L.J., doubting), confirmed the judgment of Mr. Justice Bigham.

The Great Western Railway Company appealed, and the House of Lords allowed the appeal. The following judgments were delivered:—

The Lord Chancellor: The importance of this case depends upon the true construction of the 81st and 82nd sections of the Bills of Exchange Act, 1882. I think there are more reasons than one for the opinion I entertain. But the section to which I referred is of such wide and general importance that I prefer to rest my judgment upon that. I think it is very important that everyone should know that people who take a cheque which is marked "not negotiable" and treat it as a negotiable security must recognise the fact that if they do so they take the risk of

the person for whom they negotiate it having no title to it; and in this case it cannot be pretended that Huggins had any title to it at all. I do not understand what additional security is supposed to be given to a cheque by putting the words "not negotiable" upon it, if the fact of its being negotiated can give a title to anyone. The supposed distinction between the title to the cheque itself and the title to the money obtained by it seems to me to be absolutely illusory. The language of the statute, which seems to be clear enough, would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money. The 82nd section, which contemplates the receipt of such cheque in the ordinary course of business for a customer of a bank, seems to me to contemplate a totally different class of transaction from what is disclosed in this case. The bank thought proper to take this cheque as representing its face value, and if Huggins had no title, as he certainly had not, there is nothing in the 82nd section which will entitle them to treat it as a receiving payment for a customer. It is not true to say that the banker is here sought to be made liable by reason of his having received payment for a customer. I do not think that Huggins was a customer of the bank at all within the meaning of the section; but what the bank are really insisting upon here is the valid negotiability of a cheque which was fraudulently obtained, and which it is enacted by the statute shall give no better title to the cheque than that which the person from whom it was taken himself possessed. The bank insists nevertheless that he had sufficient title to give them to enable them to sue. As I have said, I do not think Huggins was a customer at all. I do not think the transaction was a banking transaction, and although I think there is another and a distinct ground which would defeat the bank's claim, I am content to rest my judgment upon the true construction of the statute.

Lord Davey read a judgment of Lord Shand to the same effect, and also a concurring judgment of his own. In the course of the latter he said: "It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account, either a deposit or a current account, or some similar relation, to make a man a customer of a banker."

Lord Brampton: Although I am of the opinion that the evidence in this case would have justified the conviction of Huggins for larceny under sec. 88 of 24 and 25 Vict., c. 96, still, as the jury by their verdict in fact found him guilty of obtaining the cheque by false pretences, that is, of a misdemeanour and not of a felony, and as throughout the trial of this action the case was so treated, both by the appellants and by the respondents, I have

thought it right so to treat it in considering the question of the respondents' liability now before your Lordships. I do not, however, look upon this distinction as at all material, for the question before this House is not whether the respondents, when they received this cheque from Huggins, became the holders in due course in the sense that they were *bonâ fide* holders for value without notice of the fraud, nor whether they continued to be so until after the cheque was honoured by the appellants' bankers, upon whom it was drawn—for nobody impeaches the absolute integrity of the respondents, their officers, and clerks—but whether, in taking this cheque with the words "not negotiable," added to the general crossing "—— and Co.," written upon the face of it by the secretary of the appellants before it was sent to Huggins, the respondents' right to receive payment of it was affected by sec. 81 of the Bills of Exchange Act, 1882, and was not within the protection of sec. 82. I deal first with sec. 81, which enacts, "Where a person takes a crossed cheque which bears on it the words 'not negotiable', he shall not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had." The object of this section is obvious. It is to afford to the drawer or the holder (sec. 77) of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit, if he will only take the precaution to cross it, with the addition of the words "not negotiable", so as to make it difficult to get such cheque so crossed cashed until it reaches its destination. To apply that section to the present case, I cannot imagine that anybody would entertain a doubt that a person who obtains from another, by a fraudulently false pretence, a cheque so crossed with the intent to appropriate the proceeds to his own use, as Huggins did, could make any real title to such cheque; practically it would be the same as if he had stolen it. Having no title himself he had none to give to anybody else, and if this had been the case of an obliging tradesman cashing the cheque for a friend it would have been unarguable. But it is said the respondents, being bankers, are protected from liability to pay over to the appellants the moneys they have received by the honouring of the cheque, by sec. 82, which enacts that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title, or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." That the respondents in good faith received payment for the cheque is beyond question. I am not, however, quite so sure that it was altogether "without negligence," for I

must assume the manager at Wantage knew the meaning and legal effect of the crossing, with the words "not negotiable." This point, however, does not appear to have been raised, and certainly there was no finding upon it at the trial. I will reject it therefore for present purposes. The only remaining question is whether the money received by the respondents' bank, when the cheque was honoured was so received for any customer of the bank. I cannot come to the conclusion that it was. Nor do I think the evidence would justify such a finding. Huggins had no banking account at all anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential to constitute a person a customer of a bank, for if it were shown that cheques were habitually lodged with a bank for presentation on behalf of the persons lodging them, and that when honoured the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such person a customer within the meaning of the 82nd section; indeed, I think they would. But as between Huggins and the Wantage branch of the respondents' bank, the transactions amounted to nothing of the sort. It is true that for many years the branch bank manager had been in the habit of accommodating Huggins by cashing cheques made payable to him, some crossed and some not crossed; but none marked "not negotiable." All the cheques were cashed across the counter before presentation. Sometimes a portion of the amount was paid by Huggins' direction into the credit of the account kept with the bank by the Wantage Rural District Council, but there was never a cheque so changed without Huggins getting some cash out of it, and upon no occasion was a cheque paid in to the credit of the Wantage account above mentioned for presentation on their account; and I can well understand why it was so, because once paid in it could not have been got out without a cheque of the Wantage Rural District Council. I should further observe that the language of the 82nd section is where a banker "receives payment for a customer." In the case before your Lordships, on every occasion of cheques so cashed, the money had already been given to Huggins in exchange for the cheque, the money paid to the respondents has been received on their own account to reimburse them, and not on account of Huggins at all. For these reasons I think the transaction between Huggins and the respondents is not within the protection of the 82nd section, and that as Huggins could give the respondents no better title than he had himself, the appellants are entitled to your Lordships' judgment, and that this appeal should be allowed with costs.

Lord Lindley: In the view I take of this case it is unnecessary to determine whether Huggins was guilty of larceny in stealing

the cheque, or whether he only obtained it by false pretences, which is the crime of which he was convicted. Whether the cheque was void or only voidable as contended by Mr. Lawrence appears to me really immaterial. Be it void or be it voidable, it was not negotiable, and by sec. 81 of the Bills of Exchange Act, 1882, Huggins had not and was not capable of giving a better title to the cheque than he had himself. But it is said that, although the bank had a defective title to the cheque, they have a good title to the money paid to them as holders of it. My Lords, so to construe the section would destroy more than half its utility; a cheque marked not negotiable would be no safer than any other cheque if once cashed -*i.e.*, unless payment of it was stopped before it was presented. I cannot think this an admissible construction; it has never yet been judicially adopted, and I advise your Lordships to reject it. Everyone who takes a cheque marked not negotiable takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself. Fisher *v.* Roberts, 6 The Times Law Reports, 89 and 90, is an authority to this effect, and sec. 82 seems to me framed on the assumption that this view is correct. The section would not otherwise be wanted. Upon the other point, it is plain to me that the bank obtained payment of the cheque for themselves, and not for Huggins. Whether the bank is to be regarded as having purchased the cheque, or as having advanced him its amount on the security of it, seems to me immaterial. The bank wanted the money for themselves, and not for him. They were entitled to hold the money as against him, and were under no obligation to remit it to him. In no ordinary sense of the expression can the bank be regarded as collecting the money for him, although, no doubt, if the bank could keep the money, all liability on his part would be at an end, and in that way he would be benefited by their receipt of the money. Sec. 82 of the Act is a mere reproduction of the previous Act of 1876, and the construction put upon that Act in the case of Mathieson *v.* London and County Bank, 5 C.P.D., 7, was, in my opinion, correct. In Clarke *v.* London and County Banking Company, 1897, 1 Q.B., 552, the cheque was paid in for collection, and this was the *ratio decidendi*. Further, my Lords, I cannot think that Huggins was in any sense a customer of the bank; no doubt he was known at the bank as a person accustomed to come and get cheques cashed, but he had no account of any sort with the bank. Nothing was put to his debit or credit in any book or paper kept by the bank. The entry in the waste book, page 20, is only a memorandum of the transaction. Lord Justice Romer thought he was a customer because the bank had for years collected money for him; but, in my view, the bank collected money for themselves, not for him, in this particular transaction, and the evidence only shows that previous

transactions were similar to this. The case suggested by Lord Justice Romer of a customer paying in a non-negotiable cheque to his own credit when his account is overdrawn appears to me very different from that which is before your Lordships for decision. My Lords, the reasoning of Lord Justice Vaughan Williams commends itself to my mind, and, although out of deference to his colleagues he accepted a view which he would not otherwise have entertained, I am clearly of opinion that the judgments appealed from should be reversed, and that judgment should be entered for the plaintiffs with costs, and that they should have the costs of this appeal.

The appeal was accordingly allowed.

Note.—It is difficult to see how, on the main point, that of customer or non-customer, this case was ever decided otherwise than it ultimately was by the House of Lords. The mere gratuitous giving cash for a crossed cheque is, as Lord Halsbury says, not a banking transaction; it is an act of grace in no way confined to bankers; it can be, and frequently is, equally well performed by any person possessed of a banking account. The repetition of an act not in itself incident to a business relation such as that of banker and customer cannot establish that relation. Inasmuch as it was only pertinent for the House of Lords to negative the contention that Huggins was a customer, the case affords but scanty material for deciding what constitutes a customer. There is no definition of customer in the Bills of Exchange Act. The existence of a current account is, of course, conclusive: Lacave *v.* Crédit Lyonnais, 1897, 1 Q.B. 148. A deposit account also qualifies as a customer: per Lord Davey, in this case of Great Western Railway *v.* London and County Bank, 1901, A.C., at p. 421. Possibly a systematic course of discounting bills would be sufficient, that being a recognised branch of banking business. According to Lord Brampton, as above quoted, the continuous collection of cheques, crediting and paying over the amount as and when received, without a definite current account or any other operation, would constitute the relationship, though the transaction scarcely seems to fall within the sphere of practical banking. A first transaction would presumably not be, in anywise, covered by sec. 82, there being an absence of that use and habit which is an essential element in a customer: Matthews *v.* Williams, Brown and Co., 10 Times L.R. 386. Tate *v.* Wilts and Dorset Bank, Journal of Institute of Bankers, Vol. XX, p. 376. Legal Decisions affecting Bankers, Vol. I, p. 286.

Bigham, J., and A. L. Smith, L.J., agreed that the question whether a man is or is not a customer is one of fact. As in this case, however, the decision must be subject to review, and probably the nearest definition of a customer is as one who, for an

appreciable period has had dealings with a bank in the ordinary course of banking business, designed for the benefit or advantage of both parties.

There are other points to be noticed in these judgments. Lords Halsbury and Lindley dispose of the contention, based on the wording of sec. 81, that in the case of a crossed cheque marked "not negotiable" a distinction can be drawn between the right to the cheque itself and to the money obtained by means thereof. Lord Lindley vindicates the effectiveness of the not-negotiable crossing in cases where, by reason of the nature of the fraud committed, the cheque is voidable, not absolutely void.

By virtue of a sort of relation back, the rights of a transferee of a cheque crossed "not negotiable" are at all times subject to repudiation and revocation on the part of the defrauded party, where ground for such repudiation or revocation exists, as in the case of a voidable contract.

Lords Halsbury and Brampton seem to suggest that the position of a banker collecting in the ordinary way a crossed cheque for a customer would or might be prejudiced and the protection of sec. 82 lost, if such customer had obtained the cheque by larceny or fraud amounting to larceny by a trick. There is assuredly no ground for such suggestion, which is based on the technical distinction between a felony and a misdemeanour. Of the numerous considerations refuting the idea, only one or two need be referred to here. Forgery is a felony, as much as larceny, and in many cases bankers have been held protected under sec. 82 where the customer has been in possession of the cheque having forged the endorsement. The words of sec. 82, as to the customer having no title, are quite wide enough to cover the case of his being an actual thief. It would be invidious to put the collecting banker in a position inferior to that of a holder in due course, whose rights are safeguarded by statute notwithstanding conviction of the thief.

The distinction between obtaining by false pretences and larceny by a trick is highly technical and for most purposes obsolete; it can hardly be suggested that the criminality of a person not before the Court and the precise degree of that criminality should be imported into a civil trial of this sort.

Again, Lord Brampton apparently suggests that the mere fact of a cheque being crossed "not negotiable" makes it negligence in a banker if he collects it save for the true owner, or deprives him of the protection of sec. 82 if he does so. The fallacy of any such suggestion can be conclusively demonstrated, but it may be sufficient here to say that the idea was wholly discredited and abandoned in Gordon *v.* Capital and Counties Bank, 1902, 1 K.B. 242, at p. 275.

The case further goes to show that the drawer of a cheque who

has been defrauded into drawing and delivering it retains the property in the cheque and is entitled to sue for conversion of it, presumably as the owner, notwithstanding it was made payable to the fraudulent person in his official though unexpressed capacity.

Especially when viewed in the light of the subsequent case of Capital and Counties Bank *v.* Gordon (see *post*, p. 35) it would appear that this case might well have been decided simply on the ground that the bank received payment of the cheque for themselves and not for Huggins, with the same result.

[IN THE HOUSE OF LORDS.]

GEORGE WHITECHURCH, LIMITED, *v.* CAVANAGH.

1901. Reported. [1902] A.C. 117.

Company—Fraudulent Certification of Transfer by Secretary—Company not Estopped thereby.

One Raymond had undertaken to transfer to Cavanagh by way of security a number of shares in George Whitechurch, Limited. At Raymond's bidding, Wells, the secretary of the company, certified two transfers, one of preference, the other of ordinary shares in the company. The transfers were executed by Raymond as transferor, and were intended to be executed by Cavanagh, who was named therein as transferee.

The certifications were in the following form :—

"Coupon for 1,100 preference shares in the company's office. George Whitechurch, Ltd. Richard G. Wells, Secretary."

It was agreed that the word "coupon" stood for "certificate" or "certificates," and that the certification was a representation that there had been lodged in the company's office certificates for the shares specified in the bodies of the transfers, such certificates being either in the name of Raymond himself as registered owner, or in the names of registered owners who had executed in favour of Raymond transfers which had been lodged with the certificates. As a matter of fact, there were no such certificates, Raymond had no such shares as he purported to transfer, and, so far as he was concerned, the whole matter was a fraud, to which Wells was a party.

Cavanagh claimed that the company was estopped by the certification, and Bigham, J., assessed the damages at £8,325, for which he gave judgment in favour of Cavanagh.

The Court of Appeal affirmed this judgment. The company appealed.

The House of Lords allowed the appeal on the ground that the Secretary was a mere servant of the company, and, as laid down by Lord Esher in Barnett *v.* South London Tramways Co., 18 Q.B.D. 817, "his position is to do what he is told, and no person can assume that he has any authority to represent anything at all."

Per Lord James of Hereford: So far as giving certifications of shares actually deposited in his hands was concerned, the Secretary would be acting within his authority, but if he acknowledges the receipt of certificates which were never in his hands, he is doing that which his principals never intended or authorized him to do, and an act outside his agency either express or implied.

Appeal allowed with costs.

Note.—As to the similar non-effect as estoppel of certificates forged by a secretary, see Ruben *v.* Great Fingall Company, *post*, p. 132.

The distinction between the nature and effect of certification and certificate respectively is formulated by Lord Macnaghten in this case, and is subjoined as a useful exposition of the matter, which is of considerable importance.

There is a marked difference between a certificate and a certification. A certificate is under the seal of the company. By the Companies Act, 1862, a certificate is made *primâ facie* evidence of title. If faith were not given to the solemn assertions of a company under its common seal, "it would," as Lord Cairns observed in Burkinshaw *v.* Nicholls, 1878, 3 A.C., at p. 1,017, "paralyze the whole of the dealings with shares in public companies." A certification stands on a different footing altogether. Transfers are never certified under the company's seal. There is no obligation on a company to certify transfers at all. The certification is not passed by the directors or brought before the board. A certification, in fact, is only required for a temporary purpose, to meet the exigencies of business on the Stock Exchange, which has stated days and fixed periods for the different stages of a business transaction intended to be carried out under its rules. In dealings in shares not under the rules of the Stock Exchange, a certification is really out of place. In such dealings, in the case of a purchase, the price would only be paid in exchange for the transfer and share certificate on the completion of the transaction, and not before.

Still less would a certification be required if the shares were merely intended to form a security. A good equitable charge may be created by the deposit of certificates, and, if the certificates happened to include shares which were not intended to be the subject of the security, there would be no very great difficulty in defining the extent of the proposed charge in the memorandum of deposit.

It seems to me that it would be most unreasonable in any case, whether the transaction takes place on the Stock Exchange or not, to hold a company estopped by the certification of its secretary if the secretary certifies a transfer without having received the certificates. The supposed estoppel, therefore, founded on Wells' certification, in my opinion, fails altogether.

FORMAN *v.* THE BANK OF ENGLAND.

1902. Reported. 18 Times L.R. 339. Journal, Vol. XXIII, p. 150.

Dishonour of Customer's Cheque—Omission to present Cheque for Collection in proper time—London and Country Clearing.

In this case the plaintiff, Mr. T. W. Forman, a timber merchant, sought to recover from the Bank of England damages for breach of contract in dishonouring a cheque, or damages for delay in collecting a cheque and placing the proceeds to the plaintiff's credit. It appeared that the plaintiff was a customer of the Law Courts branch of the Bank of England, and on May 21st, 1901, he had a balance standing to his credit amounting to £103 6s. 10d. About midday on that day he paid into his account cheques amounting to £582 12s. 8d., including a cheque for £500 drawn by the Norwich Union Life Insurance Society upon Messrs. Barclay & Co., of 54, Lombard Street. This cheque, it was contended, ought to have been collected by the defendants and placed to the plaintiff's credit to be drawn against on May 22nd. On May 22nd the plaintiff drew a cheque on the Bank of England at their Law Courts branch for the sum of £239 in favour of Messrs. Churchill and Sim, timber agents, of 29, Clement's Lane, who duly presented the same for payment on May 23rd at the Bank of England, but the cheque was dishonoured. The plaintiff contended that there was an implied contract on the part of the defendants that, having sufficient assets in hand, they would honour his cheque. The plaintiff also maintained that in the circumstances the defendants, on receipt of the cheque for £500, owed a duty to the plaintiff to collect the cheque by immediately presenting the same for payment through the bankers' clearing-house, of which Messrs. Barclay & Co. were members, or at Messrs. Barclay's bank in Lombard Street, that they did not do that, but negligently delayed collecting the cheque, whereby the plaintiff's cheque was dishonoured. The defendants said that at the time of the presentation of the cheque referred to they had not sufficient assets in their hands to meet it. They contended that, the £500 cheque being payable at Norwich, they were entitled and impliedly authorised by the plaintiff to present the cheque at Norwich, and they did so present it with all due despatch according to the ordinary course of business through the country

clearing house, but it could not have been collected until after the cheque in favour of Messrs. Churchill & Sim had been presented. The defendants further contended that, if any undue delay occurred, it was caused by their being misled by the form of the cheque into believing it was payable at Norwich, and they were not guilty of negligence in presenting it there.

The cheque in question was in the following form:—"Norwich Union Life Insurance Society. No. 889. Norwich, May 20th, 1901. Barclay & Company (Ltd.), with which has been incorporated Gurneys, Birkbecks, Barclay & Buxton, Bank Plain, Norwich, or head office, 54, Lombard Street, London. Pay to Thomas W. Forman or order Five hundred pounds. £500. ———, Directors." The cheque was crossed "Bank of England, Law Courts Branch." It was a rule of the Bank of England that, if cheques drawn on City banks belonging to the clearing-house were paid in before 3 p.m., they could be drawn against the next day.

A number of expert witnesses were called from various banks, who expressed the opinion that the cheque in question was a London and not a country cheque; and it was also stated that there was a general custom that cheques in this form should be treated as London cheques.

No evidence was called for the defence.

The Lord Chief Justice left the following questions to the jury:

(1) Was the cheque a cheque on a City bank? (2) Is there a recognised and general custom amongst London bankers that cheques in this form should be treated as London cheques? (3) Damages.

The jury answered both questions in the affirmative, and assessed the damages at £75. Judgment was given for the plaintiff accordingly for that sum.

[IN THE COURT OF APPEAL.]

DEVERGES *v.* SANDEMAN, CLARK & CO.

1902. Reported. [1902] 1 Ch. 579.

Mortgage of Shares in Company—Implied Power of Sale—Notice to Mortgagor.

THE defendants were stockbrokers and purchased shares for the plaintiff. The plaintiff paid part of the purchase money and the defendants paid the balance for him upon the terms of an agreement with him (not by deed) that they should have a charge on the shares for the sum paid by them with interest at 6 per cent. per annum. By the desire of the plaintiff the shares were transferred to the defendants and were registered in their names. No date was fixed for repayment of the moneys advanced, and no express power to sell the shares was given to the defendants. Moneys were paid on account of the debt by the plaintiff, but a balance was left for which the defendants repeatedly applied without obtaining payment. The defendants also frequently wrote to the plaintiff telling him that if he did not discharge his liability they would consider themselves entitled to deal with the shares in any way they saw fit. The particular letter which two members of the Court regarded as notice to this effect was dated August 22nd, 1898. That letter fixed September 9th, 1898, as the last day on which the defendants would hold their hands, but this was extended to September 24th by later correspondence.

The defendants exchanged the shares for new ones on the reconstruction of the company, and ultimately sold the new shares as absolute owners in February and March, 1899.

The plaintiff brought this action for the redemption of the shares, or, in the alternative, for damages for the wrongful sale of them by the defendants.

Farwell, J., gave judgment for the defendants, 1901, 1 Ch. 70.

The plaintiff appealed.

The Court by a majority dismissed the appeal.

They held unanimously that a mortgagee of chattels, like a pawnee, had an implied power of sale on default of payment.

If there was a time fixed for payment default took place on failure to pay at that date.

If no time was fixed for repayment, then reasonable notice must be given before the power of sale is exercised.

Vaughan Williams, L.J , held that, to constitute reasonable notice, a definite fixed day must be appointed by such notice, after which the pawnee or mortgagee will exercise the power of sale. That no such definite day was fixed by the letters from the defendants, which, moreover, did not, in his opinion, constitute good notice by reason of certain incorrect statements therein as to the plaintiff's position with regard to the shares.

Stirling, L.J., held that the notice must be reasonable, regard being had to the circumstances of the case, that it must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage, and that it was at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that if he fails to avail himself of the opportunity given to redeem, the mortgagee will be in a position to put in force his rights.

He held that the letters from the defendants constituted such notice, and that the defendants were justified in selling at any time after September 24th, 1898.

Cozens Hardy, L.J., held that the notice need not state that the mortgagee will sell, it being sufficient that the notice requires payment of the mortgage money. He held that many of the defendant's letters, including that of August 22nd, 1898, were, both separately and collectively, good notices requiring payment of the mortgage debt. He held that having regard to the nature of the property a fortnight, or, at the outside, a month would in the case before him be a reasonable time.

The substituted shares were treated as standing on the same basis as those originally purchased.

Appeal dismissed by a majority.

Note.—This case should be read with Stubbs *v.* Slater, 1910, 1 Ch. 632.

[IN THE COURT OF APPEAL.]

HUGHES v. PUMP HOUSE HOTEL CO., LTD.

1902. Reported. [1902] 2 K.B., 190.

Assignment of Debt—Absolute or by way of Charge.

An ordinary debt, before the Judicature Act, 1873, was not assignable so as to enable the assignee to sue in his own name for the recovery of the debt, and the assignee could not give the original debtor a valid discharge for the debt unless expressly empowered to do so.

To simplify the remedy in favour of the assignee, sec. 25, sub-sec. 6 of the Judicature Act, 1873, was passed and is as follows:—

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal *chose in action* of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or *chose in action* shall be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or *chose in action* from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor."

The plaintiff, on March 7th, 1901, signed and gave to Lloyds Bank the following instrument:—

"In consideration of your continuing a banking account with me the undersigned, and by way of continuing security to you for all moneys due or to become due to you from me alone, or jointly with others, either on the said account or otherwise, I hereby assign to you all moneys due, or to become due, to me from the Pump House Hotel Company, Limited, of Llandrindod Wells, under or by virtue of a certain contract dated November 1st, 1899, and made between the said company of the one part and myself of the other part (being a contract for completion of the new pump room and for making certain alterations and additions to the Pump House Hotel, Llandrindod Wells), and

all other moneys, if any, due, or to become due to me from the said company, including all moneys due, or to become due, for extras in connection with the works contemplated by the said contract; and I hereby empower you, on my behalf, and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also, if necessary, to sue for, or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned, or any part thereof, and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expenses of recovering the moneys hereby assigned are to be paid out of the amount recovered; and I hereby undertake at your request and my cost to do and execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created."

On the same day notice in writing by the bank of the assignment to them contained in the above-mentioned instrument, and an authority or request signed by the plaintiff for payment to the bank of all moneys payable to the plaintiff under the contract, were given to the defendants.

Notwithstanding this assignment and notice an action was brought in the assignor's name against the defendant company for £2,788, alleged to be due as the balance of the contract price of work done under the contract of November 1st, 1899, for the completion of the work therein described.

An order had been made for the determination of the preliminary point of law whether the plaintiff was entitled so to sue, or whether the assignment of March 7th, 1901, was an absolute assignment within the meaning of the above section of the Judicature Act, 1873.

Wright, J., held that the assignment was not absolute within the meaning of sec. 25, sub-sec. 6 of the Judicature Act, 1873, that it purported to be by way of charge only, and therefore, that the action was properly brought in the name of the assignor. The Court of Appeal reversed this decision, holding that the assignment was absolute and not by way of charge only.

Mathew, L.J., said: "In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights

of the assignor in the debt or *chose in action* to the assignee, then the case will come within sec. 25, and the action must be brought in the name of the assignee."

Cozens-Hardy, L.J., agreed.

Appeal allowed.

Note.—As to equitable assignments, compare Brandt's Sons and Co. *v.* Dunlop Rubber Co., Ltd., *post*, p. 91.

[IN THE HOUSE OF LORDS.]

LONDON AND WESTMINSTER BANK, LTD., *v.* SMITH (Surveyor of Taxes).

1902. Reported. 18 Times L.R. 774. Journal, Vol. XXIII, p. 405.

Inhabited House Duty—Business Premises—Occupation by Bank Manager of part of Bank Premises.

This was an appeal from an order of the Court of Appeal (the Master of the Rolls and Lords Justices Stirling and Mathew), dated December 2nd, 1901, which dismissed with costs an order of the King's Bench Division (Justices Kennedy and Phillimore), dated May 15th, 1901. The hearing below is reported in 18 The Times L.R., 133. The question was whether upon the true construction of the Inhabited House Duty Acts the appellants were to be assessed to such duty in respect of the whole of their premises in the Strand as one single hereditament, or only the third and fourth storeys were so assessable. The facts are given in Lord Macnaghten's judgment, and were, in short, that the ground floor and basement were occupied for business purposes; the ground storey communicated internally by a staircase with the basement - the only access to the basement; that the bank manager had a private door through which he could enter the bank premises from the common staircase; that there was an entrance from the street to all the storeys and a lift; that the first and the three self-contained rooms of the second storey were occupied, as lessees of the bank, by Messrs. Robbins, Billing & Co., solicitors, and the rest of the second floor by their undertenants, Messrs. Taylor, Willcocks & Lemon, solicitors; and that the third and fourth storeys were occupied by the bank manager as his private residence. The Courts below decided in favour of the Crown. Though the question was one of inhabited house duty under 48 Geo. III, c. 55, the governing section was the 13th of the Customs and Inland Revenue Act, 1878. By sub-sec. (1) of that section "where any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall

be at liberty to give notice in writing at any time during the year of assessment to the Surveyor of Taxes for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice by the surveyor, the Commissioners, acting in the execution of the Acts relating to the inhabited house duties, shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment so as to confine the same to the duty on the value, according to which the house should, in their opinion, have been assessed if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied." Sub-sec. 2.—"Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof." The appellants relied mainly on the second sub-section, and also on the Scottish appeal of Grant *v.* Langston, 1900, A.C., 383, 69 L.J. P.C., 66. That case was that of a public-house, the floor above the licensed premises being used as a private dwelling-house. There was, however, a separate entrance from the street to the upper floor, and no communication between the public-house and the dwelling above.

The Lord Chancellor, in moving that the appeal should be dismissed, said that the whole question was now covered by authority, and he was not disposed to upset the current of cases which had dealt with it. The question was, What was a house in the ordinary sense, and what were the artificial creatures called legal houses? One must accept and not criticize the work of the Legislature, and it was the duty of the Court simply to construe the words of the Acts. The whole code was devised not so much on principle as for convenience of assessment, and plain and popular language was used. He would not repeat what had been so often said as to the artificial nature of the language employed from time to time in these Acts, but this case was beyond the reach of argument. The landlord, the bank, occupied part of the house, and there was internal communication between one part and the other part of the building. The case was clear; the landlord did occupy part, and there was internal communication. It was a dwelling-house, and part was occupied by the bank, and there was no need to repeat the forcible reasoning of Lord Justice Mathew, which he adopted.

Lord Macnaghten: I am of the same opinion, and I must say that the case seems to me to be tolerably clear. The London and

Westminster Bank are the owners of a building comprising Nos. 217 to 221, Strand. That building is undoubtedly an inhabited dwelling-house within the meaning of the House Tax Act, and *primâ facie* assessable to the tax. It is for those who claim exemption to make out their case. Now, part of this house is occupied by the bank, part is let and occupied as solicitors' offices. It will be convenient to consider these two parts separately. As regards the bank, it occupies and uses the ground floor and basement as bank premises properly so called. Two of the upper floors they occupy as the residence of their manager. These two parts are not separate houses or tenements. They are parts of one house with an ordinary communication between them by means of a door under the control of their manager. There is no ground that I can see on which the bank can claim exemption. The bank manager is not a caretaker. The case is the ordinary case of a person using part of his house as a residence and part as a place of business. If it had not been that the part of the house between the bank premises and the manager's residence is let and used as solicitors' offices, I do not think it ever would have occurred to anybody that the bank could claim exemption. Then can exemption be claimed for that part of the house which is let and used as solicitors' offices? It is admitted that exemption cannot be claimed under sub-sec. 1 of sec. 13 of the Act of 1878. It has been decided that the fact that the owner occupies part of the house would be fatal to a claim under that section, even if there were a sufficient structural division. It is said, however, that the tax is laid upon the occupier, and that the bank is not the occupier of the offices which they have let off for a term, and into which they have no right of entry except for certain purposes specified in the lease. That may be perfectly true, but, if the bank cannot claim exemption under sub-sec. 1 of sec. 13, the case seems to be met by the regulations in the Act 48 Geo. III. I think that the appeal must be dismissed with costs.

Lord Brampton concurred.

Lord Lindley said that there was no doubt that by the manager and caretaker the bank occupied the upper floors. He had at first some doubt as to the occupation by the solicitors, but that doubt had been removed, and he agreed that the appeal should be dismissed.

Appeal dismissed.

[IN THE HOUSE OF LORDS.]

STARKEY *v.* BANK OF ENGLAND.

1903. Reported. [1903] A.C. 114. Journal, Vol. XXIV, p. 219.

Forged Power of Attorney innocently presented by Stockbroker—Liability to Indemnify.

This was an appeal from a decision of the Court of Appeal (Lords Justices Vaughan Williams, Stirling, and Cozens-Hardy), dated February 21st, 1902, which affirmed the decision of Mr. Justice Kekewich, March 25th, 1901. The case is reported in L.R., 1902, 1 Ch. 610, under the title Oliver *v.* Bank of England. The question was whether the Bank or the stockbroker was to lose the value of stock improperly transferred by means of a forged power of attorney presented by the stockbroker, both parties having acted in ignorance and innocence. The appellant was a member of the firm of Starkey, Leveson and Cooke, stockbrokers in the City. On and before December 23rd, 1897, there were standing in the books of the respondents in the names of Frederick William Oliver and Edgar Oliver a sum of £2,633 12s. 6d. Consolidated Stock, and a sum of £147 5s. 4d. Bank Stock. On December 16th, 1897, the appellant's firm sent in to the respondents an application in writing for a form of power of attorney from Frederick William Oliver and Edgar Oliver to the appellant and Edward John Leveson for the purpose of sale of the stock. The Bank, in pursuance of the application, and in the belief that it was authorised by Edgar Oliver, issued to the appellant's firm a form of power of attorney from Frederick William Oliver and Edgar Oliver to the appellant and the said Edward John Leveson jointly and severally for the sale and transfer of the said Consolidated Stock. The appellant or his firm procured the power of attorney to be executed by Frederick William Oliver, but the signature of Edgar Oliver was in fact forged. The respondents allowed the appellant to transfer the said Consolidated Stock in the transfer book, and, alleging himself to be and purporting to act as attorney of both Frederick William Oliver and Edgar Oliver, he did all acts required to transfer the said stock in the books of the respondents on December 23rd, 1897. On December 21st, Frederick William Oliver directed the appellant's firm to sell the stock and send the cheque to him; this was done, and the proceeds,

amounting to £2,958 16s. 7d., were paid to his private account at the Union Bank. A like course was pursued with reference to the Bank Stock of £147 5s. 4d. F. W. Oliver died on July 7th, 1899. Edgar Oliver thereupon brought an action against the respondent Bank for replacement of the stock, and the Bank served the appellant's firm with a third party notice for an indemnity. Mr. Justice Kekewich gave judgment for the plaintiff against the Bank, and held that the appellant was bound to indemnify the Bank. The question before the House related only to such liability on the part of Starkey, the appellant.

The Lord Chancellor, in moving that the appeal should be dismissed with costs, said that the principle upon which the question must be settled was laid down nearly half-a-century ago in Collen *v.* Wright, 8 E. and B., 647. That principle was thus expressed by Mr. Justice Willes:—"The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in fact exist." His Lordship was quite unaware that anything had since happened to impair the authority of that decision, which was not affected in any way by Derry *v.* Peek, 14 A.C., 337; in their Lordships' House. That was an action of deceit, and all that the case decided was that in such an action you must prove deceit. Thus the matter became one of fact only. There was no doubt here that Mr. Starkey represented himself as possessing an authority which he did not possess, and that the Bank acted on that supposed authority. It was unnecessary to go through the catena of cases which had been cited. It was enough to say that the present appeal was precisely covered by Collen *v.* Wright.

The other noble and learned Lords concurred, Lord Lindley observing that this was the first occasion upon which he had ever heard the authority of Collen *v.* Wright impugned.

Appeal dismissed.

TURNER *v.* THE LONDON AND PROVINCIAL BANK LTD.

1903. Reported. Journal, Vol. XXIV, p. 220.

Crossed Cheque—Forged Endorsement—Collecting Banker—Negligence.

This was an action brought by the plaintiff to recover a sum of £1,053 17s., being the amount of three cheques drawn by the plaintiff in favour of three persons of the names of Valentine, Wolton and Kelly. The cheques were all crossed and marked "not negotiable." On Sunday, July 20th, the plaintiff despatched the three cheques in separate letters and posted them in a pillar-box, but before the box was cleared the three letters were abstracted and the cheques stolen, and in their place in each letter was put a forged cheque for an amount similar to that inserted in the cheque stolen from it, and they were then re-posted. But whereas the genuine cheques were drawn on the London City and Midland Bank, the forged cheques were drawn on the National Provincial Bank and Union Bank of London forms. The stolen cheques were taken by one Allen, who had an account at the Essex Road branch of the defendant bank, to that bank on the morning of Monday, July 21st, when he asked that they might be specially collected for him. At that time the endorsements of the three payees of the cheques had been forged upon them. In compliance with Allen's request, the defendants' manager wrote to the bank at which the plaintiff's account was kept and desired to be advised the "fate" of the cheques. In reply the defendants were informed that the cheques were paid and credited as desired. After receiving this information they allowed Allen to draw against the three stolen cheques to the extent of £1,025, on the morning of Tuesday, July 22nd. The defendants relied on the protection afforded to bankers by sec. 82 of the Bills of Exchange Act, 1882.

Evidence was given to show that Allen opened an account on November 23rd, 1901, at the Essex Road branch of the defendant bank, and that he from time to time paid money into his account and drew money out. On opening his account Allen gave the name of a reference, but the clerk at the bank omitted to enter the name of the reference in the book kept for that purpose. It appeared that Allen had engaged a room at the house whose

address he gave to the bank, but he left it almost immediately, leaving his rent unpaid, and never actually resided there; and it was said that the clerk in charge of the bank was informed of this, but he denied that anything was ever said to him about it. An examination of the endorsements of the cheques, none of which were drawn in favour of the customer, showed that two of them were in the same handwriting; and it was pointed out that, as the payees were different persons, this ought to have aroused suspicion in the minds of those in charge of the bank. The practice of the defendant bank in dealing with crossed cheques was proved to be as follows:— As soon as the cheques are handed to the bank they are credited to the account of the customer by whom they are handed in; but he is not allowed to draw against them until it is seen whether they are honoured or not, and if they are dishonoured the amount is debited to the account of the customer who handed them in. In this case Allen was allowed to draw against the stolen cheques after the defendants had ascertained that they would be paid, but before the defendants were actually credited with the amount through the clearing house. Evidence was also given to show that at some banks especial care is taken in dealing with cheques marked "not negotiable," and that it is a common practice for banks to make special collections of cheques for their customers.

The jury found that the bank acted negligently in taking the cheques as they did, and

Mr. Justice Walton thereupon gave judgment for the plaintiff for the amount claimed, with costs, including the costs of a former trial in which the jury disagreed.

Note.—This case was, as will be observed, decided prior to the decision of the House of Lords in Capital and Counties Bank *v.* Gordon, otherwise the bank must have been deprived of protection, having clearly received payment for themselves, and not for Allen. It is only cited as an instance of the sort of circumstances influencing a jury to find negligence against a collecting banker. The fact that on two cheques payable to different payees, paid in in the same batch, the endorsements were in the same handwriting, is a matter which might easily escape notice. The lack of enquiry into the standing and habits of the customer seems somewhat remote from the actual transaction. The request for special collection is not necessarily suspicious. The enquiry as to whether the cheque would be paid is a precaution taken by the collecting banker entirely in his own interest. *Cf.* Ogden *v.* Benas, L.R., 9 C.P., at p. 516.

[IN THE HOUSE OF LORDS.]

CAPITAL AND COUNTIES BANK, LTD., *v.* GORDON— LONDON CITY AND MIDLAND BANK LTD., *v.* GORDON.

1903. Reported. [1903] A.C. 240. Journal, Vol. XXIV, p. 342.

Crossed Cheques—Bankers' Drafts—Orders with Receipt attached—Bills of Exchange Act, 1882—Secs. 60, 77 (6), 82—Stamp Act, 1853, sec. 19—Revenue Act, 1883, sec. 17—Effect of crediting Crossed Cheques as Cash before receiving Payment.

These appeals were from a decision of the Court of Appeal (the Master of the Rolls and Lords Justices Stirling and Mathew) covering both cases, and reported 18 the Times L.R., 157; 1902, 1 K.B., 242; and elsewhere.

The cases arose out of the frauds of Alfred Jones, who for some ten years was ledger clerk to the respondent, James Gordon, who carried on business in Birmingham as a manufacturer of coffin furniture, under the style of Gordon and Munro. In March, 1899, the respondent discovered that Jones had, since the beginning of 1895, been in the habit of opening letters addressed to the respondent by his customers, and stealing therefrom cheques made payable to the respondent under his trade name. The cheques so abstracted were stated to have amounted to over £3,000, and of these about 116, in the case of the London City and Midland Bank, were traced, representing £2,067 odd. These cheques were treated by the Courts below as being divisible into eight classes, viz.:—

(1) Cheques payable to Gordon and Munro or order, not drawn on the appellants, and not crossed when taken by them.

(2) One cheque payable to Gordon and Munro or bearer, not drawn on the appellants, and not crossed when taken by them.

(3) Bankers' drafts, drawn by one of the country branches of the appellants' bank upon the appellants' head office, payable to

Gordon and Munro or order, and not crossed when received by the appellants from Jones.

(4) Crossed cheques drawn on the appellants, and payable to Gordon and Munro or order.

(5) Crossed cheques marked "not negotiable," payable to Gordon and Munro or order, and not drawn upon the appellants.

(6) Crossed cheques payable to Gordon and Munro or order, and not drawn on the appellants; this class comprises the great majority of the cheques.

(7) Crossed cheques payable to Gordon and Munro or bearer, and not drawn on the appellants.

(8) Instruments drawn in favour of Gordon and Munro and crossed, payable only upon signature by the payees of a form of receipt at the foot of the instrument, and not drawn upon the appellants.

No question arose upon this appeal concerning the cheques comprised respectively in classes 2 and 7, as to which it was admitted in the Court below that the respondent could not succeed, nor as to the cheques comprised in class 4, as to which the Court of Appeal decided in favour of the appellants. These three classes together only included eight out of the 116 cheques. On July 29th, 1895, Alfred Jones opened an account with the appellants, at their branch at Sparkbrook, Birmingham. He did so in the name of "Jones and Co.," under which style he was trading as a cardboard box manufacturer. In October, 1898, Jones took one Blackham into partnership, and Jones's account with the London City and Midland Bank was thereupon closed, and a new account opened by Jones and Blackham in the name of "Jones, Blackham and Co." The accounts were constantly overdrawn from November, 1897, and but for the 116 cheques stolen from the respondent there would have been a continuous overdraft almost from the opening of the account. Jones had no agreement with the appellants for an overdraft, and they could have stopped his overdraft at any moment. The respondent was, up to March, 1899, when he discovered Jones's fraud and forgeries, in complete ignorance that Jones was carrying on any business either alone or in partnership, or had any banking account. It was proved that Jones from time to time paid into these accounts the said 116 cheques, after forging upon them the respondent's endorsement. It also appeared that Jones endorsed all the said cheques either "Jones and Co.," or "Jones, Blackham and Co.," as the case might be. This was done, as the bank manager stated, in order that the appellants might have the security of Jones's name. The mana-

ger further stated there was no necessity for him expressly to request Jones so to endorse the cheques, since Jones always did so, and that if Jones had omitted to endorse a cheque he should probably have asked him to do so, since he desired to have that endorsement. The cheques, as soon as they were paid in by Jones, as before stated, were placed by the appellants to Jones's credit at once, without waiting for their collection. The bank's rubber stamp was stamped or impressed on the cheques respectively immediately after their being placed to Jones's credit as before mentioned. So soon as a cheque or draft was paid in by him to the appellants' bank, Jones became entitled as between himself and them, to draw against it, and did so at his pleasure. After stamping the cheques with their rubber stamp, the appellants proceeded to get, and did get, payment of those included in classes 1, 5, 6 and 8 from the various banks whereon such cheques respectively were drawn. As to the drafts included in class 3, the same were forwarded by the appellants' Sparkbrook branch to the appellants' head office in London, who credited the Sparkbrook branch in account with the amount of such drafts respectively. In March, 1899, the respondent discovered the frauds, and Jones was arrested, prosecuted, and convicted at the Birmingham Summer Assizes, 1899, and sentenced to five years' penal servitude. The trial took place at the Birmingham Summer Assizes, 1900, before Mr. Justice Bucknill and a special jury. On December 19th, 1900, the Judge gave judgment for the respondent as to the cheques comprised in classes 1 and 2. As to all the other classes the Judge decided in favour of the appellants. On December 9th, 1901, the Court of Appeal entered judgment with costs for the respondent for £1,954 16s. 7d., being the total amount of the cheques or drafts comprised in classes 1, 3, 5, 6, and 8 above mentioned. Judgment without costs was given for the present appellants as regards the cheques in class 4, and also as regards those in classes 2 and 7, which latter, as before stated, were abandoned by the present respondent, without argument, in the Court of Appeal. The facts are similar in the case of the Capital and Counties Bank, in which 32 cheques were in question, amounting together in value to £388 9s. 6d. They were drawn payable to Gordon and Munro or order; all save two were crossed generally by the drawers; one, the last in the above list, was also marked "not negotiable." None of these 32 cheques were drawn upon the Capital and Counties Bank. On November 13th, 1896, Alfred Jones opened an account with the Birmingham branch of the appellant bank in the name of "Warner and Co.," which he told the appellants was the name under which he was trading as a general factor at Dale End, Birmingham. Jones was in fact so trading; but the respondent was in ignorance of the fact up to March, 1899, when

he discovered Jones's fraud and forgeries. It appeared on the trial that Jones paid into this account with the appellants' bank the said 32 cheques after forging thereon the respondent's endorsement as before stated. He also endorsed all these cheques (with the exception of the five cheques paid in during July, 1898) to the appellants' bank. On the said cheques respectively being so paid in by Jones, the appellants at once placed the same to his credit and stamped the same with a rubber stamp, thereby imprinting across the said cheques respectively the name of the Birmingham branch of the appellants' bank. So soon as a cheque was paid in by him to the appellants' bank, Jones became entitled as between himself and them to draw against it, and did so at his pleasure. After stamping the cheques the appellants proceeded to get, and did get, payment of the same from the various banks whereon such cheques were drawn. The jury found that neither of the appellant banks had been guilty of negligence. Mr. Justice Bucknill, on further consideration, gave judgment for the appellants. The Court of Appeal reversed the judgment of the learned Judge on further consideration, and entered judgment for the respondent for £388 9s. 6d., with costs.

Lord Macnaghten: I am sure I need not trouble the House by recounting in detail the facts of these cases or describing the classes into which, for the sake of convenience, the drafts forming the subject of this litigation have been divided. It will be enough, I think, to remind your Lordships that all the drafts now in question were stolen from the respondent Gordon, trading in Birmingham under the style of Gordon and Munro, by a man called Jones, who was Gordon's ledger clerk for about ten years. Jones himself lived in Sparkbrook. Unknown to his employer, he carried on a small business of his own as a coffin furniture maker in Birmingham. In the name of the firm under which he traded he kept an account with the Birmingham branch of the Capital and Counties Bank, and also with the Sparkbrook branch of the London City and Midland Bank. To one or other of these accounts Jones paid all the drafts which he stole from Gordon, forging the necessary endorsement when the draft was payable to order on demand, as was generally the case. When the fraud was discovered and Jones had been prosecuted and convicted, Gordon brought an action against each of the two banks for conversion of such of the stolen drafts as could be traced to its hands, with a count in the alternative for money had and received to his use. The actions came on to be tried before Mr. Justice Bucknill and a special jury. The only question left to the jury was the question of negligence. The result of the findings of the jury on this point was in favour of the banks. All other questions were reserved for the Judge. On the principal matter in

controversy Mr. Justice Bucknill gave judgment for the banks. This decision, however, was reversed by the Court of Appeal. The main question, and the one most important as regards amount, related to crossed cheques payable to order on demand drawn on banks other than the bank which was being sued. It is not disputed now that as regards these cheques there can be no defence, unless protection is afforded by sec. 82 of the Bills of Exchange Act, 1882, which declares that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner by reason only of having received such payment." Now it is admitted that each of the two banks acted in good faith. The suggestion of negligence on their part has been negatived by the findings of the jury. It cannot be denied that Jones was a customer within the meaning of the section. The only question, therefore, is, Did the banks receive payment of these cheques for their customer? If they did it is obvious that they are relieved from any liability which, perhaps, might otherwise attach to some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory—it would be worse than nugatory—it would be a mere trap, if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business, and intended to lead up to that result. The character in which a bank receives payment of a cheque is, as has been already said in this House, a question of fact. To my mind it would have been more satisfactory if the jury, under proper directions from the Judge, had answered this question themselves. It was, however, withdrawn from their consideration. The appeal was argued very fully and very ably by the learned counsel for the appellants, and especially by Mr. Cohen. And I must say that I was a good deal impressed by his argument in opening. At first sight there is not much difference between the case of a bank which at once credits a customer with the face value of a cheque paid in to his account and allows him to draw against his credit balance thus increased, and the case of a bank which, without crediting the customer with the value of a cheque before collection, allows him to overdraw his account in view of the anticipated credit. In each case, it was said, the credit is only provisional, whether entered in the customer's account or not. In each case, it was said, payment when received is received for the customer. And in a sense that is true. Then it was urged with some force that practically the only result of upholding the decision under appeal will be to compel some bankers to keep a double set of books where now one set only is

required, and thus to impose upon bankers a good deal of extra and, perhaps, unnecessary trouble. But the protection conferred by sec. 82 is conferred only on a banker who receives payment for a customer—that is who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value. So long as a bank has for its customers only persons of position with whose circumstances the manager is fully acquainted, as is not unfrequently the case in country districts, where one bank by arrangement with its competitors has a monopoly, it matters little whether the bank at once credits a customer with the face value of cheques paid into his account or waits until collection. The bank only looks to its own customers. But Parliament may have thought that in the increase of banking business likely to arise in consequence of the legislation with respect to crossed cheques, and the competition sure to follow, it would not be improbable that small accounts might be opened with banks by persons of little or no credit, and that it might be a dangerous thing to extend protection to bankers dealing with crossed cheques in all cases, whether they acted simply as agents for collection or in a different character. Or possibly at the time bankers asked for no further protection than that which sec. 82 purports to confer. However that may be, your Lordships have only to construe the language of sec. 82 in connection with the language of the other sections of the Act bearing on the point. It seems to me, my Lords, that the decision of the Court of Appeal on this question, which is the main question involved, is perfectly right. In the judgments of the learned Judges of the Court of Appeal, and especially in the judgment of Collins, M.R., I find the subject dealt with so completely, both as regards the history of the legislation and the principles and decisions applicable to the case, that, speaking for myself, I think it would be a waste of time to do more than say that I accept their view. It appears to me that the Master of the Rolls has accurately summed up the whole case. "The protection afforded by sec. 82 must," he says, "be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed on bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques and in which they deal with cheques other than crossed cheques at the present time—namely, by treating

them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer---I think they are collecting the money, not merely for their customers, but chiefly for themselves, and therefore are not protected by sec. 82." On all the other questions that have been raised, I agree with the Court of Appeal except as regards the small drafts of which class 3 is composed. On this point I agree with my noble and learned friend, Lord Lindley, whose opinion I have had the advantage of reading. It is a very small point and ought not, I think, to make any difference as regards the costs of the appeal. Subject, therefore, to a slight variation as regards these drafts, amounting in all to £32 15s. 9d., I move, your Lordships, that the decree be affirmed and the appeal dismissed with costs.

Lord Shand, Lord Davey, and Lord Robertson briefly expressed their concurrence.

Lord Lindley: The question raised by this appeal turns entirely on the true construction and effect of sec. 82 of the Bills of Exchange Act, 1882. The facts are simple and not in controversy. Gordon, who traded as Gordon and Munro, was the holder for value of 32 crossed cheques, drawn by various persons on various banks, and payable to Gordon and Munro or order. Gordon had a clerk, named Jones, and he forged endorsements in the name of Gordon and Munro on these cheques, and then took or sent them to the Capital and Counties Bank, where he had an account. Jones also endorsed them in his own name, and the bank credited his account with the amounts, and he drew on his account whilst the amount of the cheques so paid in stood to his credit. The bank manager dealt in this matter with perfect *bonâ fides* and without negligence, having no suspicion that anything was wrong. He said he held the cheques until he received payment for Jones and credited his account with the proceeds, and that he received the cheques in the ordinary course of banking business, and that all the cheques were collected for Jones. The bank manager was not cross-examined on these answers, but there is some ambiguity about them. The documents and accounts, however, show exactly what was done, and it is plain that the bank did not wait until the cheques paid in by Jones had been passed through the clearing-house before their amounts were placed to his credit. They were placed to his credit when he paid the cheques in, and he was allowed to draw upon his account increased by them as above stated. None of the cheques were ever returned to the bank: they were all duly honoured and the appellant bank received their amounts in due

course from the banks on which they were respectively drawn. Afterwards Jones's frauds were discovered, and he was prosecuted and convicted. Gordon, who had been robbed of the cheques and wrongfully deprived of the money represented by them, brought an action against the bank to recover that money which the bank had received under the circumstances above described. My Lords, if this case had to be determined on general principles of English law apart from statutory enactment the bank would have had no defence to Gordon's action. Before the Judicature Acts he could have recovered the value of the cheques, either in an action of trover or in an action for money had and received. A long series of well-established authorities, which cannot, I apprehend, be now questioned, establishes the liability of the bank beyond all dispute; nor was this seriously contested by the counsel for the appellants. But then reliance is placed on sec. 82 of the Bills of Exchange Act, 1882. This section has come before the Courts more than once, and before this House in The Great Western Railway Company *v.* The London and County Bank, 1901, A.C., 414. Those cases only go to show that a bank is not protected by the section unless, first, the bank acts in good faith and without negligence; unless, secondly, it receives payment for a customer; and unless, thirdly, the bank only receives such payment. The last paragraph of the section shows that this last condition is as important as the first and second. But the questions in any particular case whether a bank has received payment for a customer, in good faith and without negligence, and whether the bank has only received such payment, are questions of fact depending on the circumstances of each case. The facts of this particular case do not, in my opinion, bring the bank within the operation of the section. What has to be considered is not the cheque, but its payment. Now, when the cheque was paid to the bank, the bank received the payment for itself rather than for Jones. It is no doubt true that if the cheque had been dishonoured Jones would have become liable to reimburse the bank the amount advanced by it to him when it placed the amount to his credit. This he would have to do whether any cheque, crossed or not, was placed to his credit and was afterwards dishonoured. To this extent and in this sense it may be said that the bank received payment for Jones, because payment of the cheque discharged him from the liability he would have been under to repay the bank the sum placed to his credit if the cheque had not been paid. But what your Lordships have to consider is not Jones's liability to the bank if the bank never received payment of the cheque, but for whom did the bank, in fact, receive such payment. The amount would not be again placed to Jones's credit, it was already there. The bank in its then ignorance of the forgery could not withdraw that credit after

it had received payment of the cheque. As between the bank and Jones, the money paid belonged to the bank as soon as the bank received it. The bank had a right to sue for the money and to apply it in any way the bank thought proper, provided only Jones was not treated as owing its amount. It was said by the appellants' counsel, with some confidence, that any jury of business men would find, as a fact, that the bank received payment of these cheques for Jones and nothing more. All I can say is that I think it very likely they would do so if left to themselves without proper directions from the Judge, but that if proper directions were given them they would not be likely to go wrong. It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right. Nothing occurred in this case which had any such effect to the knowledge of the bank. It appears to me impossible to say that under these circumstances the bank received payment of the cheques in question for their customer Jones. Whether it is desirable to alter the wording of sec. 82, is not for your Lordships to consider on the present appeal; but so long as that section stands in its present form bankers who desire its protection will have to be more cautious and not place crossed cheques, paid in for collection, to the credit of their customers, before such cheques are paid. This appeal should, in my opinion, be dismissed with costs. I pass now to the appeal of the London City and Midland Bank (Limited). This appeal raises not only the same question as the last, but also several further questions owing to the forms of the cheques and drafts paid by Jones into the appellant bank. On page 3 of the respondent's case eight classes of instruments are described, but of these only Nos. 1, 3, 6, and 8 have to be considered by your Lordships. Class 6 is like those which had to be considered in the appeal of the Capital and Counties Bank. It is unnecessary for me to say more about these, for the reasons already given are applicable to them. It may, however, be useful to mention that Jones was required by the London City and Midland Bank to endorse the cheques which he paid into it, and that he frequently availed himself of the credit given him for those cheques by drawing against such credit. The accounts show that this was constantly done and to a much greater extent than in the case of the Capital and Counties Bank. These additional circumstances cannot in any point of view improve the position of the appellant bank. The decision of the Court of Appeal on this class was, in my opinion, correct. Class 1 consists of cheques not crossed when taken by the appellant bank. My Lords, it appears to me that sec. 82 would be deprived of all meaning if it were held to apply to cheques not crossed when they came to the hands of the bank seeking the

protection of that section. Section 77, clause 6, does not assist the appellant bank in the present case, although it might be useful if an endorsement were forged after a crossing. As regards this class, I can usefully add nothing to what was said in the Courts below. Class 3 presents more difficulty; it consists of four small drafts drawn by a country branch of the appellant bank on its own head office and not crossed. The first question which has to be considered is whether these instruments are bills of exchange as defined in sec. 3 of the Bills of Exchange Act. If they are, then, not being crossed, sec. 82 will have no application to them, even if that section could have applied in this case to such documents if crossed. But if these drafts are bills of exchange within the meaning of sec. 3 they will come within sec. 60, and the bank will be protected by it, for these cheques are drawn on the bank sought to be made liable for paying them. But I agree with the Court of Appeal in thinking that the bank, which is both drawer and drawee of these instruments, is not entitled to treat them as bills of exchange as defined in sec. 3 of the Bills of Exchange Act, although a holder may sue the bank upon them and treat them either as bills of exchange or as promissory notes [see sec. 5 (2)]. An instrument on which no action can be brought by the drawer can hardly be a bill of exchange within sec. 3 of the Act, whatever it may be called in ordinary talk. Next it was contended that sec. 17 of the Revenue Act of 1883 (46 and 47 Vict., c. 55) extended to these documents and brought them within the protecting clauses of the Bills of Exchange Act. But, as pointed out by the Court of Appeal, sec. 17 of the Revenue Act, 1883, only applies to drafts issued by a customer of a bank, whilst these drafts were issued, not by a customer, but by a bank to a customer. I agree, therefore, with the Court of Appeal on this point. But then reliance was placed on the Stamp Act of 1853 (16 and 17 Vict., c. 59, sec. 19), which relates to drafts or orders drawn on bankers and payable to order on demand. The section exonerates the bankers drawn upon from liability if they pay such drafts or orders to holders claiming under endorsements which are forged. This statute was passed before crossed cheques were regulated by statute, and it has no special reference to them, nor does it refer to any bankers except those on whom the instruments are drawn. The history of this section is well known. It was inserted at the instance of Lord Overstone, when cheques to order on demand bearing one penny stamps were first introduced. He saw that these would become common, and would expose bankers to serious risks from forged endorsements; and the section was inserted for their protection. The Stamp Act of 1853, except sec. 19, has been repealed; but sec. 19 has been preserved, and in 1872 it was made applicable to documents issued by the Paymaster-General in pursuance of the Court of

Chancery Funds Act (see 35 and 36 Vict., c. 44, sec. 11). This section, although referred to in the amended points of defence, was apparently overlooked in the Court below; at all events, it is not noticed in the judgments delivered by the Court of Appeal. I can, however, find no reason for saying that it does not apply to class 3. In terms it clearly does. Mr. Justice Bigham had this point before him in Brown and Co. *v.* National Bank of India (The Times L.R., June 17th, 1902, p. 669), and he decided that in that case the bank was not protected. He did so on the authority of the decision of the Court of Appeal in the case now before your Lordships; but it is manifest that had it not been for this authority the learned Judge would have decided the other way. The draft he had to deal with was drawn in Madras on London, and Mr. Grant, in his book on banking, p. 24, says that sec. 19 only applies to inland bills. It is unnecessary to consider whether he is right in this respect, as the drafts now under consideration are inland drafts. I invite your Lordships' attention to the fact that sec. 19 of the Act of 1853 is left unrepealed by the Bills of Exchange Act, 1882, although sec. 60 of that Act is evidently taken from sec. 19 of the Act of 1853, and made applicable to bills of exchange and to cheques as defined in secs. 3 and 73 in the Bills of Exchange Act of 1882. The only conclusion which I can draw from these enactments is that sec. 19 of the Act of 1853 was purposely left unrepealed in order that it might apply to drafts or orders which did not fall within the definitions of bills of exchange or cheques in the codifying Act of 1882. These definitions are far more limited and scientific than the sweeping descriptions contained in the Stamp Acts, and sec. 19 of the Act of 1853 appears to me to be purposely preserved in order to protect bankers cashing drafts or orders on them which are not bills of exchange or cheques as defined in the Act of 1882, in the same way as sec. 60 of that Act protects them from cashing documents drawn on them, which are bills of exchange and cheques as defined in it. As regards these four drafts, therefore, I think there has been an oversight, and that the decision appealed from is wrong. There remains only class 8 —*i.e.*, instruments drawn in favour of Gordon and Munro and crossed payable only upon signature by the payees of a form of receipt at the foot of the instrument and not drawn upon the appellants. These documents are clearly not bills of exchange within the meaning of the Bills of Exchange Act. Nor, for reasons already given, are they brought within it by sec. 17 of the Revenue Act, 1883. Nor do they come within sec. 19 of the Stamp Act of 1853, which, as I have already observed, applies only to banks which are drawees. In substance this appeal fails, although as to a few drafts of comparatively small amounts it succeeds. The result, in my opinion, therefore, is that the

decision of the Court of Appeal should be affirmed except so far as it relates to the drafts forming class 3, but that as to them the decision should be reversed. This success is, however, too small to affect the costs of the appeal, which should be borne by the appellants.

The appeal was accordingly dismissed, subject to a variation.

Note.—This is one of the most important banking cases decided in recent years, but its effect was, after a considerable interval, largely neutralised by the passing of the Bills of Exchange (Crossed Cheques) Amendment Act, 1906 (6 Edw. VII, c. 17). It may be doubted whether the House of Lords fully realised what was the accepted and undoubted result of the judgment, namely, that the mere crediting as cash in the books of the bank cheques paid in by a customer, before the amount was actually received from the paying banker, put the collecting banker outside the protection of sec. 82, apart from agreement express or implied that the customer might draw against such cheques before they were cleared, or any such actual drawing by him. Some judges even declined to recognise this as the inevitable outcome of the judgment (*e.g.*, Akrokerri (Ashanti) Mines *v.* Economic Bank, *post*, p. 63, and Bevan *v.* National Bank, *post*, p. 135). The Act of 1906 was an admission that the position had been correctly gauged by the banking community as above stated, and at the same time regularised that position. It enacts that "a banker receives payment of a crossed cheque for a customer within the meaning of sec. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof." But though by this means the case has lost much of its original importance, the judgments involve a variety of practical questions which are apparently independent of or left untouched by the amending Act. In the first place, this case disposes for ever of the contention that a collecting banker can obtain any protection by crossing to himself, under sec. 77 (6), a cheque reaching him uncrossed. It has been frequently stated that the sub-section was introduced for the express purpose of affording such protection, and, indeed, it is somewhat difficult to discern its drift or utility from any other point of view. The protection of sec. 82 is, however, correlative to the risk arising from the practical obligation to collect crossed cheques for customers resulting from legislation primarily designed for the public good, while there is, in theory, no such obligation in the case of uncrossed cheques. The extension of means of protection to the latter would thus have been somewhat arbitrary and only to be accorded on clearer wording than that of the sub-section which incidentally includes cheques crossed generally, as to which the banker needs no further

protection. *Per contra*, the collecting banker gains from this case the benefit of a wide but obviously reasonable interpretation of sec. 82 as covering not only the receipt of the money, but also all preliminary dealings with the cheque legitimately leading up to that receipt, a matter on which Collins, M.R., in the Court of Appeal, had taken the opposite view. The Act of 1906 cannot safely be taken as covering more than the actual state of things it was designed to remedy, namely, crediting as cash in the banker's own books, to which, indeed, its wording would seem confined. Crediting in the customer's own pass-book, delivered to him, being an invitation or authority to draw, would therefore seem outside the strict purview of the Act. So again, any definite agreement or understanding that uncleared cheques should be drawn against would, in all probability, exclude the operation of the 1906 Act. This is somewhat anomalous because, according to the better opinion, the crediting as cash of itself still gives the customer, in the absence of contrary stipulation, the right to draw against the cheques at once, while the 1906 Act applies to protect the banker against the true owner. This is another of the results of the 1906 Act being strictly confined in its terms and operation to the immediate object in view, namely, the retention of the immunity of sec. 82, which involves only the relative position of collecting banker and true owner, and has no connection with the respective rights and liabilities of banker and customer. The latter were naturally largely dealt with in the Gordon case and the subsequent Act does not affect or alter the views there expressed with relation thereto. Thus, it is the dictum of Lord Lindley which is relied on for the above mentioned right of the customer to draw against cheques as soon as credited: "It must never be forgotten that the moment a bank places money to the customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right," 1903, A.C., at p. 249. This right can, of course, be abrogated by agreement either express or implied from conditions adequately brought to the notice of the customer on opening the account, *cf.* Akrokerri (Ashanti) Mines *v.* Economic Bank, *post*, p. 63. This incidental decision in the case arises from the line there adopted of drawing a sharp distinction between the mere conduit pipe or agent for collection and the holder for value, the banker falling within the latter category when he acts with regard to the cheque in any manner indicating assumption of property in it, crediting as cash being held such an act. The denomination of holder for value is really inapplicable in this connection in perhaps the majority of cases. Where there is forged endorsement the banker could never be a holder at all; the antithetical position to that of mere agent would then be better defined as that of a person who but for forged endorsement would have been a holder for

value, one who has taken the cheque as his own or for better or worse. So with regard to the processes leading up to the receipt of the money, before referred to; in case of forged endorsement these cannot be strictly legitimate or in the ordinary course of business; the possessor of the cheque has no right to deal with it in any way or even retain it; the protection accorded to such preliminary processes must therefore, to be any use at all, be held to extend to dealings which would be proper and regular were there no element of forged endorsement affecting the cheque. Lord Macnaghten's judgment is the most emphatic on this distinction between agent and holder for value, but even he would doubtless admit an exception in the case of a banker becoming under sec. 27 (3) holder for value of a crossed cheque by virtue of his lien arising out of overdraft, the cheque not having been paid in expressly in reduction of that overdraft. It cannot be that the casual existence of a small overdraft should debar the banker from protection with respect to a crossed cheque of far larger amount. On the above principle, the position of holder for value attained by crediting as cash entitles the banker in the absence of forged endorsement or the not-negotiable crossing to sue all parties on the cheque, if dishonoured, in his own right independent of the customer's defective title, but in practice other elements of consideration would usually be present. A right, less easily explainable, but unquestionably recognised in this case, is that of the banker to incontinently debit his customer with a returned cheque which he has credited as cash, so becoming the holder or quasi-holder of it. The facility would logically seem confined to the relation of agent and principal, its application, despite the cessation of that relation and its conversion into that of transferee and transferor must mainly rest on this judgment. Custom of bankers hardly explains it, inasmuch as the practice must originally have been based on the conception of the collecting banker as an agent.

The legal character and attributes of two important classes of instruments were dealt with and defined in this case. Drafts drawn by one branch of a bank on head office or *vice versâ*, payable to order on demand, were declared not to be within the protection of sec. 60, as not being bills, since drawer and drawee were in law component parts of the same corporation or legal entity, and so not independent parties. The benefit of the ambiguous sec. 5 (2) of the Bills of Exchange Act, as to a bill in which drawer and drawee are the same person, is, of course, as pointed out by Lord Lindley, in any case confined to the holder and could not be invoked by the bank. But the same result was obtained by the House deciding that such drafts were within sec. 19 of the Stamp Act, 1853, which enacted with respect to "drafts or orders drawn upon a banker for a sum of money payable to order on demand"

provisions similar to those of sec. 60 of the Bills of Exchange Act as to cheques. The history of this earlier enactment, referred to by Lord Lindley, might well lead to the conclusion that it was not designed to include drafts or orders on bankers other than those drawn by customers, "draft or order" being the then equivalent for "cheque," and the protection being avowedly extended to bankers as a counterpoise to the additional risk accruing to them from the legalisation by the same statute of order cheques with only a penny stamp, an innovation in favour of the public. On the other hand, the fact that this isolated section was left unrepealed on the passing of the Bills of Exchange Act, 1882, may fairly be pointed to as showing an intention that it should stand to cover instruments of a nature far less technically circumscribed than cheques. Whether the protection extends to foreign as well as inland drafts, the House were not constrained to and did not decide, but they showed a marked tendency towards the wider construction, against the adoption of which there appears in fact no valid reason. Such drafts, however, are not susceptible of crossing, in consequence of the change of wording from "draft or order" in the earlier and now repealed crossed cheques legislation to "bill" as the definition of a cheque in the Bills of Exchange Act, and of their exclusion from sec. 17 of the Revenue Act, 1883, by reason of their being issued, not by the customer, but by the banker.

The other class of documents dealt with in this case are those referred to as Class 8, namely, orders on a banker by a customer in which payment is made to depend on signature of a specified incorporated receipt. The requisition of such signature renders the document conditional and so deprives it of the character and incidents of a bill or cheque, including that of negotiability. In the Gordon case, the documents of this class were drawn on banks other than those appealing, so that the question of their inclusion under sec. 19 of the Stamp Act, 1853, did not arise, but one of Lord Lindley's references to them might be taken as implying that, with regard to any bank on which drawn they were so included. It is submitted, however, that the holding them not negotiable must exclude them from a section dealing only with instruments payable to order, thus predicating negotiability, and designed to cover forgery of an endorsement incidental to negotiation.

There seems no valid ground for excluding such documents from crossing under sec. 17 of the Revenue Act, 1883, but the second clause of that section expressly denies any extension thereby of negotiability to any document not otherwise possessing that quality, and so presumably neither paying nor collecting banker can claim any privilege or protection by virtue of a crossing on any of these documents, if he deal with it on behalf

of any person other than the original payee. Lord Lindley's reference to them at the end of his judgment might seem to imply that in no event could these documents be brought within the crossed cheques sections of the Bills of Exchange Act through this section of the Revenue Act, 1883. He says: "Nor, for reasons already given, are they brought within it (the Bills of Exchange Act) by sec. 17 of the Revenue Act, 1883." Secs. 76-82 inclusive are the only sections the Revenue Act purports to touch, and there are no previous reasons in the judgment in any way bearing on this question, unless it be that even admitting the efficacy of crossing these documents, its protective power had been forfeited by the crediting as cash. This, however, must remain matter of conjecture.

Neither with regard to these documents, assuming them to be susceptible of crossing, nor with regard to dividend warrants, as distinguished from cheques, which can unquestionably be crossed under sec. 95 of the Bills of Exchange Act, does the Bills of Exchange (Crossed Cheques) Amendment Act, 1906, apply, so as to protect the banker crediting them as cash before receiving payment. That Act deals exclusively with "a crossed cheque," it has no interpretation section extending the meaning of the word "cheque," and its reference to sec. 82 implies that the word must be read in the limited sense in which it is there employed. The new Act does not provide that it is to be incorporated or read with the 1882 Act, but only that the two may be cited together under a combined name. Being avowedly an amending Act it cannot be regarded as applying generally the provisions of sec. 82, and through it its own, to every document which by other sections of the 1882 Act or by independent statute is, for certain defined purposes, assimilated to a cheque.

Nor can anything be found in the provisions directly dealing with these exceptional documents strong enough to bring them within the purview of the 1906 Act. Sec. 95 of the Bills of Exchange Act and sec. 17 of the Revenue Act, 1883, alike pick out certain specified portions or sections of the Bills of Exchange Act and say they are to apply to the documents in question. There is no mention in either case of possible supervening legislation. There is nothing recognising the documents as cheques or annexing to them that character or anything more than some selected special incidents of a cheque. The words of the Revenue Act, 1883, "and shall so extend as if the said document were a cheque," are the nearest approach to anything of the sort, but they are carefully limited to the special object, and fall far short of the radical and distinct pronouncement which alone could suffice to transmute what was not previously a cheque into one for purposes of subsequent, unanticipated and independent legislation dealing exclusively with cheques.

[IN THE PRIVY COUNCIL.]

IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON.

1903. Reported. [1903] A.C. 49.

Certified Cheque—Fraudulent Alteration of Amount—Payment to another Bank—Money paid by Mistake—Principle on which recoverable.

One Bauer was a customer of the Bank of Hamilton and he drew a cheque on that bank for $5. He so drew it as to leave space for alteration. It was dated January 25th, 1897, and on that day Bauer took it to the Bank of Hamilton and got it marked or certified with the bank's stamp. Bauer converted it into a cheque for $500, and opened an account with it at the Imperial Bank of Canada, upon which he drew out by cheques. The altered cheque was passed by the Imperial Bank of Canada through the Clearing House at Toronto and was paid by the Bank of Hamilton on the morning of January 27th, 1897, the fraud not having been then discovered.

Being a certified cheque, the Bank of Hamilton, following the usual practice, did not refer to the customer's account before paying it. Had they done so, they would have found that he had not sufficient to his credit to meet the $500, and enquiries would have resulted in the detection of the fraud.

On the next day, January 28th, 1897, the Bank of Hamilton, on reference to Bauer's account, did discover the fraud and immediately gave notice to the Imperial Bank of Canada, requiring repayment of the $495 difference between the amount they had certified for and the raised amount they had paid.

The demand not being complied with, this action was brought to recover $495 as money paid under mistake of fact.

The Canadian Courts decided in favour of the Bank of Hamilton, Armour, C.J., dissenting in the Court of Appeal, and Gwynne, J., in the Supreme Court. The Imperial Bank of Canada appealed to the Privy Council.

The Privy Council advised His Majesty to dismiss the appeal with costs.

The grounds on which the Imperial Bank of Canada disputed liability were the following:—

1. Because the Bank of Hamilton was negligent in marking the cheque with the blank space in it.

2. Because the Bank of Hamilton was negligent in paying the forged cheque without first turning to Bauer's account.

3. Because notice was not given to the Imperial Bank of Canada on January 27th, the day on which the cheque was paid.

As to the first point, which was not seriously relied on in the Privy Council, the Committee held that it could not be upheld, in face of the decision of the House of Lords in Scholfield *v.* Londesborough, 1896, A.C., 514. See further Colonial Bank of Australasia *v.* Marshall, 1906, A.C., 559, post p. 111.

As to the second point, the Committee held, on the authority of Kelly *v.* Solari, 9 M. and W., 58, that money honestly paid by mistake of facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed.

On the third and principal point, the judgment of the Committee, delivered by Lord Lindley, was as follows:—

There remains the third ground, which is based upon a supposed hard and fast rule referred to by Armour, C.J., who said:—

"In my opinion this case is governed by the rule laid down in Cocks *v.* Masterman, 9 B. and C., 902, where it said, 'But we are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or a dishonoured bill, and that if he receives the money and is suffered to retain it during the whole of that day the parties who paid it cannot recover it back.'"

This rule, rigorous though it may be, has been adhered to in England ever since: see Mather *v.* Lord Maidstone, 18 C.B., 273; Durrant *v.* Ecclesiastical Commissioners, 6 Q.B.D., 234; Leeds Bank *v.* Walker, 11 Q.B.D., 84; London and River Plate Bank *v.* Bank of Liverpool, 1896, 1 Q.B., 7; "Byles on Bills," 17th Edition, 317.

The application of this rule does not at all depend upon whether the holder of the bill is or is not in fact prejudiced by the delay, for the conclusion in law is that he may be prejudiced, and this is the reason of the rule.

In this case the defendants, the holders in due course of the cheque, presented it to the plaintiffs on January 27th through the Clearing House, and it being due on presentation, the defendants were entitled to know on that day whether it was honoured or dishonoured.

The plaintiffs paid the cheque through the Clearing House on that day; but this payment was, in my opinion, conditional upon

their right to dishonour the cheque during that day, but not having dishonoured the cheque during that day such payment became absolute, and the defendants having received the money for the cheque from the plaintiffs, and being suffered to retain it during the whole of that day, the plaintiffs cannot recover it back."

The prejudice which it is suggested that the Imperial Bank of Canada may have suffered, from want of notice of dishonour on January 27th, consists in their inability to take proceedings on that day against Bauer for the fraud which he had committed. But no one suggests that Bauer could have paid anything if he had then been proceeded against. The bank was not deprived of any of its rights against him, nor was its position altered by reason of notice of the forgery not being given until the day after the bill was paid.

But, quite apart from the fact that the appellants were not in any way prejudiced by want of notice on the day of payment, it appears to their Lordships that the stringent rule referred to in the foregoing extract from the judgment of Armour, C.J., does not really apply to this case. The cheque as drawn and certified, *i.e.*, for $5, was never dishonoured, and no question arises as to that. The cheque for the larger amount was a simple forgery; and Bauer, the drawer and forger, was not entitled to any notice of its dishonour by non-payment. There were no endorsers to whom notice of dishonour had to be given. The law as to the necessity of giving notice of dishonour has therefore no application. The rule laid down in Cocks *v.* Masterman, and recently re-asserted in even wider language by Mathew, J., in London and River Plate Bank *v.* Bank of Liverpool, has reference to negotiable instruments, on the dishonour of which notice has to be given to someone, namely, to some drawer or endorser, who would be discharged from liability unless such notice were given in proper time. Their Lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their Lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay in giving it.

Their Lordships, therefore, will humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs.

Note.—The critical examination by Mathew, J., in London and River Plate Bank *v.* Bank of Liverpool, of Cocks *v.* Masterman, and the subsequent cases, demonstrates fairly conclusively that the moving principle is the necessity for maintaining negotiability by ensuring that the holder of a negotiable instrument shall know on the day it falls due whether it will be paid or not. If he receives the emphatic answer of payment, even by

mistake, it is not the possible loss of a remedy over, but the presumed commercial injury of having had the money in his hands for an appreciable period and having to restore it which bars recovery. The justification for so rigid a rule applies only, as pointed out by the Privy Council, to instruments negotiable in themselves or become so by estoppel against particular parties, and does not extend to mere shams, such as the cheque here was, outside the original $5.

With regard to giving notice of dishonour, it could not be given so long as the instrument was paid, and it might have been assumed that the date for giving it was that of the reclaiming the money paid, or if referable to the original payment, that notice was excused by the Bills of Exchange Act, 1882, sec. 50 (1).

[IN THE COURT OF APPEAL.]

BELL *v.* THE NATIONAL PROVINCIAL BANK OF ENGLAND LIMITED.

1904. Reported. [1904] 1 K.B. 149. Journal, Vol. XXV, p. 34.

Absorption of Bank by Purchase—Income Tax—How assessed.

This was an appeal from the judgment of Mr. Justice Ridley on a case stated by the Commissioners of Income Tax, reported 1903, 2 K.B. 249. The facts set out in the case were as follows:—At a meeting of the Commissioners for the general purposes of the Income Tax Acts and for executing the Acts relating to the Inhabited House Duties for the City of London, the National Provincial Bank of England, Limited, appealed against an assessment of £4,818 beyond their assessment on their own return of £228,493 for the year ended April 5th, 1900, against an assessment of £3,218 beyond their assessment on their own return of £299,768 for the year ended April 5th, 1901, and against an assessment of £1,634 beyond their assessment on their own return of £300,253 for the year ended April 5th, 1902, under Schedule D to the Act 16 and 17 Vict., c. 34, in the following circumstances: The National Provincial Bank of England, Limited (the present respondents), which was established in the year 1833, and is now registered under the Companies Acts with a nominal authorized capital of £15,900,000, on which £3,000,000 has been paid, has, since its foundation transacted and transacts banking business at the head office in Bishopsgate Street, in the City of London, and at a large number of branch establishments in London and various parts of England and Wales, such branch establishments now numbering 199. The County of Stafford Bank, Limited, was established in the year 1836 under the name of the Bilston District Banking Company, with a deed of settlement. In 1873 the company was registered under the Companies Act, 1862, as a company with unlimited liability, and the name of the company was changed to that of the County of Stafford Bank. In 1882 the company was incorporated as a company with limited liability under the name of the County of Stafford Bank, Limited, the registered capital being £800,000, divided into 20,000 shares of £40 each. The head office and banking house of the company was at Wolverhampton, and under the regulations registered as

the articles of association the business of the company was to be carried on there, and at such other places as the board might from time to time appoint. The company was also empowered to establish such branch banks, agencies, and local boards in the United Kingdom as the directors thought proper. As a matter of fact, however, the business was only carried on at Wolverhampton, and the powers conferred on the company under these regulations of establishing other business branch banks, agencies, and local boards were not exercised. By agreements made respectively in February, 1899, and March, 1899, the whole of the business of the County of Stafford Bank, Limited, which had carried on business for some 62 years previously on the same premises and without any branches, its business premises, furniture, and fixtures, and such of its assets and liabilities as were and are provided by the agreements and shown in the balance-sheet annexed to the latter of the said agreements, was and were, as from the close of business on December 31st, 1898, purchased by the National Provincial Bank for the sum of £225,000 under and upon the terms of the agreements. The business of the County of Stafford Bank was carried on as usual, but for the benefit and at the expense of the National Provincial Bank, until the close of the business at 4 p.m. on March 5th, 1899, when the premises were closed. On the following morning—viz., March 6th—the same premises were opened as their Wolverhampton branch by the National Provincial Bank, who had never previously had any branch or carried on any business at Wolverhampton. The manager and the whole of the former staff were taken over by, and have, subject to necessary and ordinary changes, since continued to remain there in the employ of the National Provincial Bank of England, Limited. Business has since been carried on by that bank at the same premises; none of the books of the County of Stafford Bank, Limited, were taken over or continued in use by the National Provincial Bank, except that the ledgers, being found to be in the same form as those used by the bank, were continued in use by them to the end of the current year. In such of the pass-books as were continued in use a notice was inserted by means of a rubber stamp to the effect that as from January 1st, 1899, the account was with the National Provincial Bank of England, Limited, and all new cheque-books and pass-books were issued in the name of the National Provincial Bank of England, Limited. From December 31st, 1898, the profits, if any, earned at and by the National Provincial Bank's Wolverhampton branch merged in and formed part of the general profits of the National Provincial Bank of England, Limited, without any distinction as to source or origin of profit, and there are no means of ascertaining whether there were any profits or the proportion of increase or decrease, if any, in the profits of

the bank which has arisen from the business, etc , so purchased as aforesaid. The ultimate profits divisible among the shareholders of the National Provincial Bank of England, Limited, are the result of the trading of the company as a whole, including the head office and all the branches, irrespective of the profit and loss arising from the business done at the head office or any particular branch. At and from the head office of the bank the general affairs of the company are transacted, and the working of the branches is regulated and supervised by the board of directors and general manager through various departments. All profits are dealt with and received by the head office. There are many classes of expenditure which are not and cannot be definitely allocated in any way, such as general management and departmental and establishment expenses which cannot be definitely attributed to any particular branch. The general assessments of the National Provincial Bank for the years ended April 5th, 1901, and April 5th, 1902, include some portion of the profits made by the Wolverhampton branch of the bank, if any were made—viz., the assessment for the year ended April 5th, 1901, the profits on average for the preceding year 1899, and the assessment for the year ended April 5th, 1902, the profits on average for the preceding years 1899 and 1900; but as the accounts were merged in the general accounts of the bank it is impossible to differentiate between the profits made by the Wolverhampton branch of the bank and the general profits of such bank from the time the County of Stafford Bank was taken over. There are no means or accounts which would enable the bank to make a return under the Income Tax Acts of the profits of the said Wolverhampton branch (if any) or apply for the benefit of sec. 133 of 5 and 6 Vict., c. 35, in respect to such profits if less than the estimate. Profits were made by the County of Stafford Bank, Limited, from the business at Wolverhampton for each of the three years ended December 31st, 1896, 1897, and 1898 respectively, when the accounts were made up as follows:—1896, £4,801; 1897, £4,750; 1898, £4,904; and the present assessments of £4,818, £3,218, and £1,634 respectively for the years ended April 5th, 1900, April 5th, 1901, and April 5th, 1902, appealed against are assumed profits made by the National Provincial Bank, based on an estimate for the first year on the average of the profits of the County of Stafford Bank of the three preceding years—viz., 1896, 1897, and 1898—after the usual allowances for dividends, rents, etc., on which Income Tax had been paid by way of deduction, based for the second of the said years on one-third of the profits of the years 1897 and 1898, and based for the third of the said years on one-third of the profits of the year 1898. An assessment was made on the County of Stafford Bank, Limited, for the year ended April 5th, 1899, based on the average profits of the three

preceding years ended December 31st, 1897, and the duty was paid by the said company. There was no assessment for any one of the years ended April 5th, 1900, April 5th, 1901, or April 5th, 1902, on the County of Stafford Bank, Limited. Assessments on their own returns had also been made for the years ended April 5th, 1900, April 5th, 1901, and April 5th, 1902, respectively on the National Provincial Bank at its head office in London, on amounts based on the average of the profits of its whole business for the three years ended respectively on December 31st, 1898, December 31st, 1899, and December 31st, 1900, as shown by the published accounts and balance-sheets for each period of three years respectively, and the duty on such assessments was duly paid by the bank. The National Provincial Bank of England, Limited, duly appealed against such assessments to the Commissioners of Income Tax for the City of London. On the hearing of such appeals the Surveyor of Taxes contended that the National Provincial Bank were liable to the additional assessments in order to cover such estimated profits, and further contended that there was a succession on the part of the bank to the business of the County of Stafford Bank, Limited, according to the terms of the fourth rule of the first and second cases, Schedule D of sec. 100 of 5 and 6 Vict., c. 35, and that, consequently, the bank should be assessed to include the estimated profits of the business purchased from the County of Stafford Bank, Limited, estimated upon an average of the profits of the said periods of three years respectively of the said County of Stafford Bank, Limited. The National Provincial Bank contended that the profits, if any, of the business carried on at Wolverhampton during the period covered by such additional assessments could not be made or included in the basis of any assessment against the bank for that period, which was by the Act limited to the years 1896, 1897, and 1898, during none of which did the National Provincial Bank carry on any business at Wolverhampton; that such profits, if any, were merged in the general profits of the bank and were liable to be extinguished or diminished by reason of losses elsewhere or general expenses; and in any event would, in due course, form part of the basis of assessment. Further, that if the additional assessment was to be allowed the bank would be doubly assessed on such proportion of their profits, if any, as arose from the business purchased from the County of Stafford Bank. The Commissioners were of opinion that there was no succession within the meaning of the said fourth rule, also that the said business when purchased was not sufficiently, generally or separately, identified after merger in the National Provincial Bank's business to render the profits, if any, properly subject to separate assessment, and that the bank were or would be charged with a fair proportion of the profits and were not liable to be

additionally assessed over and above the ordinary assessments on the profits of the National Provincial Bank, and they discharged the assessments accordingly. From this decision the Surveyor of Taxes appealed. Mr. Justice Ridley affirmed the decision of the Commissioners. The Surveyor of Taxes appealed to the Court of Appeal, and, on the appeal, it was further contended on behalf of the bank that the question was one of fact, and that the Court would not interfere with the decision of the Commissioners on a question of fact.

The Court allowed the appeal.

The Master of the Rolls said that in 1899 the National Provincial Bank of England acquired by purchase the business of the County of Stafford Bank, and the question was whether, for the purpose of the assessment of Income Tax, there was within sec. 100, Schedule D, rule 4, applicable to the first and second cases, of the Income Tax Act, 1842, a "succession." The first case of sec. 100 was:—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act." Rule 1 applicable to that case provided that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years, ending on" April 5th preceding the year of assessment. By rule 4, applying to the first and second cases, "if amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership, either by death or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein, before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or successions to such business as aforesaid, unless such partners or such person succeeding to such business as aforesaid, shall prove, to the satisfaction of the respective Commissioners, that the profits and gains of such business have fallen short, or will fall short, from some specific cause to be alleged to them, since such change or succession took place, or by reason thereof." The important part of Rule 4 began:—

"Or if any person shall have succeeded to any trade, manufacture, adventure, or concern." That was to say, in the case of a succession, the ordinary three years' average rule, prescribed by Rule 1 of the first case, had to be applied. That raised the important question upon the figures here, because, if there was a succession, the profits of the old County of Stafford Bank would have to be assessed in the manner described in Rule 1 on the average of the three preceding years. Upon the other hand, if there was no succession the National Provincial Bank would have the right to treat the acquisition of the old Stafford Bank as the opening of a new branch at Wolverhampton, and would have the right to treat it as a part of the National Provincial Bank; and, as no profits had been made in the preceding years by the National Provincial Bank in the bank at Wolverhampton, no profits would come into the calculation, and the amount to be assessed would be smaller than if the average of the profits of the County of Stafford Bank for the three preceding years were taken into account. If there was a succession the judgment of the learned judge was wrong. He held that the profits of the County of Stafford Bank in the previous years did not come into the calculation. It seemed to him (the Master of the Rolls) that the words of Rule 4 were plain. If the National Provincial Bank had not been in existence before the Stafford Bank was acquired, but a new company had been formed to take over the Stafford Bank, the case would have come directly within Rule 4. A new company formed for the first time and acquiring the Stafford Bank would clearly "succeed" to the concern within Rule 4. What difference could it make if that company was already in existence and carrying on business? The company none the less succeeded to the business acquired because they already had another business. This was not the case of a person buying an existing business for the purpose of annihilating it, because he desired to get rid of the competition and to carry on his own business more successfully. There was nothing of that kind here. The former business of the County of Stafford Bank was now carried on by the National Provincial Bank pretty much as before, except that the profits were merged in the profits of the National Provincial Bank. The Income Tax Commissioners had found that there was no succession within the meaning of Rule 4. That was not a finding of fact, but a statement of a proposition of law that in such a case there was no succession within the meaning of Rule 4. It was not like the case of an old bank opening a new branch in Wolverhampton. The present case was the acquisition of a then existing business which had now become part of the business of the National Provincial Bank. It was contended that the question whether there was a succession or not was one of fact for the Commissioners, who had found the fact,

and for this proposition the case of Ferguson *v.* Aikin* was referred to. It might be in some cases a question of fact. But the Commissioners here, if it were a question of fact, had not decided it. They had given the Court the benefit of a problem of law and had asked the Court whether their decision was right. In his opinion the decision was wrong. It was not necessary to go into other cases in which it had been held that, the Commissioners having found that there was no succession in fact, the Court refused to go behind that finding. In Prescott, Dimsdale and Co. *v.* Bank of England, 1894, 1 Q.B., 351, the only point decided was whether certain banks which were amalgamated continued respectively to carry on their business, and it was held that they had ceased to carry them on. That was no authority upon the present case. The appeal must therefore be allowed.

The Lords Justices delivered judgment to the same effect.

Appeal allowed.

Note.—A point which hardly appears to have attained due prominence in this case is whether acquisition by purchase constitutes a succession within the meaning of the Income Tax Act and rules. As stated above, the National Provincial Bank bought up the County of Stafford Bank for a lump sum of £225,000. It has been frequently laid down under the Succession Duty Acts that a succession can only occur by one of two methods, devolution and derivation, and the same proposition appears to hold good in all questions of what is a succession. Devolution there could be none in this case. The County of Stafford Bank was a limited company, having therefore perpetual succession in itself, there were no pre-existing relations between it and the National Provincial Bank which could in any event operate in law to transfer automatically its property to the latter body, and such legal operation is the main and essential element of devolution. Then as to derivation. Derivation implies the acquisition of property by the voluntary gratuitous act of another person, as by will or gift. The introduction of legal consideration imports an element inconsistent with and destructive of derivation. When a man buys a horse, he derives it, as Jessel, M.R., pertinently said in Fryer *v.* Morland, 3 Ch.D., 675, not from the previous owner, but from the money in his own breeches pocket. And if the idea of succession be considered as a whole, instead of under its alternative components, devolution and derivation, the word is singularly inapt to denote acquisition by purchase. The purchaser of an estate would never be described or spoken of as having succeeded to it. He may have succeeded the previous owner in it, but that is not the wording of the Income Tax rule

* 1898, 4 Tax Cases, 36.

in question, which only touches a person who has succeeded *to* a trade, manufacture, adventure, or concern, the phrase being repeated in the same form several times. If, as Jessel, M.R., said in Fryer *v.* Morland, *ubi sup.*, a vendor can never be a predecessor, the converse must be true, and a purchaser never a successor. To exempt the man who buys a business from income tax imposed on one who gets a business for nothing would be in accordance with reason, and a principle recognised in the Succession Acts and taxing statutes generally. It is not like the purchase of securities which yield an income of their own accord; the purchaser of a business has not only to pay for it but to work it to get anything out of it. There are cases of real succession to a business which afford legitimate subject matter for the operation of the rule. A man frequently leaves or hands over his business to his son, or an employee may get hold of it by being on the spot at the critical moment. It can hardly be suggested that what the National Provincial Bank bought was the physical belongings of the County of Stafford Bank, its premises, furniture and so forth, and that this means they acquired and succeeded to the business of that bank without specifically paying for it. As far as could possibly be provided, the goodwill or business was included in the purchase. There was no evidence to show how much of the old business of the County of Stafford Bank was actually continued to or came to the hands of the National Provincial, and the reasonable view seems to be that either they did not succeed to the business, concern, or adventure at all, or, if they did, they paid for it. The case of Rylope Coal Company *v.* Foyer, referred to above, does not, when examined, run counter to the view here expressed. There was no real purchase there: the partnership was merely turned into a company, all the shares in which the former partners allotted to themselves, and no money whatever passed.

AKROKERRI (ASHANTI) MINES, LTD., *v.* THE ECONOMIC BANK, LTD., and NOBBS—BIPPOSU MINES, LTD., *v.* SAME—ATTASI MINES, LTD., *v.* SAME—ASHANTI MINES, LTD., *v.* SAME.

1904. Reported. [1904] 2 K.B. 465. Journal, Vol. XXV, p. 447.

Forged Endorsement on Cheques—Crediting as Cash—Implied Course of Business—Crossing by "Holder"—Lien of Collecting Banker—"Account Payee."

THESE were actions to recover damages for conversion, and for money had and received. The facts being practically similar, the four cases were, by agreement, tried together.

The facts sufficiently appear in the judgment.

Mr. Justice Bigham delivered the following considered judgment:—These actions are brought to recover damages for the alleged conversion of a number of cheques, and the question which I have to determine is whether the defendants are entitled to the benefit of the statutory defence provided by sec. 82 of the Bills of Exchange Act, which enacts that:—"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." The facts are as follows:—The four plaintiff companies had one office in London, which they used in common. They had also one clerk, a man named Nobbs, who acted as their secretary. From time to time Nobbs fraudulently procured the directors to sign cheques drawn on the companies' bankers and made payable to the order of different persons with whom the companies were in the habit of doing business. The cheques were crossed generally and then handed to Nobbs to be forwarded to the different payees. Nobbs, however, kept them for himself, forged the endorsement of the payees, and then handed them to the defendant bank, by whom they were forwarded to the plaintiff's bankers for presentation and payment. They were duly paid, and Nobbs received the proceeds from the defendants. Nobbs has been prosecuted to conviction for the

frauds, and is now in prison. To assist him in carrying out his frauds Nobbs had opened an account with the defendants, and the better to conceal his frauds he opened it in a false name—that of Evans. The defendant bank carries on a business which may be described as that of a deposit or savings bank. By the memorandum of association its objects are described as being "to carry on the business of a bank, but so that the company shall not engage in any discount operations or make loans or permit any overdrafts;" and the investments which it is permitted to make are limited to certain selected statutory trustee securities. When Nobbs opened his account he read and signed an application form, which contained, amongst other things, a notice that no bills would be discounted and that cheques would not be paid against until cleared. The course pursued when Nobbs brought the stolen cheques to the defendants was this. He filled up a paying-in slip and handed it, together with the cheque, to the defendants' counter clerk; this clerk entered the amount in a book kept for such purposes at his desk. The clerk then gave the cheque and the paying-in slip to another clerk, who entered the particulars in a book called the waste-book. The waste-book clerk then put the cheque into a box and handed the paying-in slip to the ledger clerk, who posted the amount there and then in the ledger to the credit of the Evans (Nobbs) account. The box was used as a receptacle for all cheques brought to the bank by customers, and it was cleared several times in each day by a messenger, who took the cheques to the bank of Messrs. Williams Deacon and Co., to whom the defendants specially crossed the cheques. Beneath the special crossing the defendants, by a rubber stamp, impressed on the cheques the words "account Economic Bank." Thus when the cheques reached Williams Deacon and Co.'s hands they were specially crossed to those bankers, and bore in addition the words mentioned. It appears that the defendants had two accounts open with Messrs. Williams Deacon and Co.—one a current account, which was always in credit, and the other a loan account, which was always in debit. Williams Deacon and Co. always held securities belonging to the defendants exceeding in value the debit to the loan account. These securities were deposited specifically to secure that account. There were occasions when the amount of the debit of the loan account exceeded the amount to the credit of the current account. On the evening of the day on which Williams Deacon and Co. received the cheques they attended with them at the Clearing House and cleared them. By half-past nine on the next morning the defendants were informed by Williams Deacon and Co. whether any, and, if any, which, of the cheques had been dishonoured, and if no such advice arrived the defendants assumed that the cheques had been duly honoured by the banks on which

they were drawn; and it was then, and not till then, that the defendants entered the amounts to the credit of the customers in the pass-books. The entries, however, though in fact made the day after the cheques were received, were dated as of the day of the receipt of the cheques. Thus Nobbs never got a credit entry in his pass-book until after the defendants had received the proceeds of the cheque which he had handed to them. The defendants acted throughout in good faith and without negligence. On the foregoing facts, it is quite clear that at common law the defendants by what they did rendered themselves liable to account to the plaintiffs for the proceeds of the cheques. They had no more right as against the plaintiffs to deal with the cheques than had the thief from whom they got them. Then arises the question whether they have a statutory defence, and that depends upon whether the facts bring them within the protection afforded by sec. 82 of the Act. Now it is clear that the cheques were crossed cheques when they were received by the defendants. They were, therefore, of the kind to which the section applies. It is also clear that the defendants were bankers within the meaning of the section and that they acted in good faith and without negligence. So far, therefore, the defendants are within the terms of the section. What is it, then, that remains to be considered? Two things. The first, whether when the defendants received payment they did so for their customer; the second, whether there are any circumstances outside the receipt of the payment which render them liable for the conversion. The section says that, in order to afford a protection to the defendant banker, the payment must have been received by him for a customer; and the section then limits the protection to the liability incurred by reason of such receipt. Then, first, did the defendants receive the payment for their customer? The expression "for a customer" has been often discussed and its meaning has now been made fairly plain by judicial interpretation. Money is received for a customer in those cases only where the banker acts as a mere agent to collect. Thus it is that if the banker as between himself and his customer becomes the holder of the cheque for value before he collects it, he does not receive the payment for his customer, he receives it for himself. The question, then, resolves itself into this—Did the defendants receive the payments as mere collecting agents for Nobbs? It is argued that they did not, because they gave Nobbs credit for the value of the cheques in their ledger before they sent them to Williams Deacon and Co. for collection, and, so it is said, made themselves holders of the cheques for value. But, in my opinion, the entries in the bank's ledgers did not make the bank holders for value. The entries neither conferred any right on Nobbs to draw the money out of the bank, nor did they fix the bank with any liability to pay the money to him. It might have

been different if the entries had been made in the pass-book, for that book belongs to the customer, and the entries made in it by the bank are statements on which the customer is entitled to act. Suppose, after the ledger entries were made, but before the cheques were sent to Williams Deacon and Co., Nobbs had asked the defendant bank to return him the cheque, could the bank have refused to comply with his request? Could they have said, No; the cheques are ours, for by entries in our ledger of which you know nothing we have given you credit for the amounts and so have made ourselves holders for value? I think not. Nobbs, having regard to the terms on which the business was carried on, would have been entitled to say that he had never assented to any transfer of the cheques, and that therefore they were still his. In truth, notwithstanding the ledger entries, no credit was given to Nobbs; nor was it intended that he should have credit; and, if Nobbs had demanded the money, the defendants would have been entitled to refuse to pay it to him. I think, therefore, that the defendants, in forwarding the cheques to Williams Deacon and Co., and so obtaining the money, were acting as mere agents to collect and were receiving the payment for their customer within the meaning of the section of the Act. The next question is—Have the defendants done anything more than receive payment so as to make themselves liable in trover? It is said that they have. It is argued that, in sending the cheques to Williams Deacon and Co.'s bank, they subjected them to a lien in the hands of that bank by reason of the existence of the loan account, the debit to which at times exceeded the credit to the current account, and that this constituted a conversion. This is, in my opinion, a fanciful point. Williams Deacon and Co. received the cheques for the purpose of collection merely, and, therefore, could not use them except to present them for payment. They could not have detained them; they were bound at once to present them for payment. Moreover, Williams Deacon and Co., as bankers, would know that the cheques paid in to them might be the property of the defendant bank's customers (as, in fact, these particular cheques were), and they could have no right to exercise a lien on securities which were not the property of the defendants. Then it was said that the defendants had made an unauthorized alteration in a material part of the cheques by changing the general crossing into a special crossing. No doubt the Act of Parliament by sec. 78 makes the crossing a material part of a cheque and forbids any addition to or alteration of it except as authorised by the Act. But sec. 77, sub-sec. 3, expressly provides that where a cheque is crossed generally the holder may cross it specially. It was argued that this authority does not extend to mere agents for collection, and that "holder" must be read as meaning only holder for value. I see no reason, however, for

limiting the operation of the section in such a way. Holder does not necessarily mean a holder for value. The expression includes every person who is in lawful possession of the instrument, and therefore includes an agent for collection. Lastly, it was said that the defendants had made an unlawful addition to the crossing by stamping upon the cheque the words "account Economic Bank." But in my opinion these words are not in any sense an addition to the crossing. A crossing is a direction to the paying bank to pay the money generally to a bank or to a particular bank, as the case may be, and when this has been done the whole purpose of the crossing has been served. The paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words "account A.B." are a mere direction to the receiving bank as to how the money is to be dealt with after receipt. The truth is that all that the defendants did from the moment they received the cheques down to the time when they received the payment was done in the ordinary course of business for the purpose of safely and properly obtaining payment; and as sec. 82 protects the banker from the common law liability which the receipt of the payment would involve, it also of necessity protects him from any consequences which might otherwise flow from the steps properly taken to obtain the payment. This is made quite clear in the opinion of Lord Macnaghten delivered in the House of Lords in the case of Capital and Counties Bank *v.* Gordon, 1903, A.C., 240. It is to be found at page 244*:—"The only question, therefore, is, Did the banks receive payment of these cheques for their customer? If they did, it is obvious that they are relieved from any liability which perhaps might otherwise attach to some preliminary action on their part taken in view and anticipation of receiving payment. The section would be nugatory—it would be worse than nugatory—it would be a mere trap if the immunity conferred in respect of receipt of payment, and in terms confined to such receipt, did not extend to cover every step taken in the ordinary course of business and intended to lead up to that result."

Judgment for the defendants, with costs.

Note.—Some of the points in this case became immaterial on the passing of the Bills of Exchange (Crossed Cheques) Amendment Act, 1906, and it is unnecessary to refer to the apparent discrepancy between part of the judgment of Bigham, J., and the decision of the House of Lords in the Gordon case as to the effect of crediting as cash. There was, however, a substantial distinguishing feature in this case. As stated in the judgment, the business of the defendant bank was of an exceptional nature,

* See *ante*, p. 39.

which precluded any discount operations, loans, or overdrafts. There was, therefore, a presumption that anticipating payment of a cheque, being in the nature of discount, was not a transaction likely to be undertaken by the bank. Further, when Nobbs opened the account he was definitely given to understand and assented that no bills would be discounted and that cheques would not be paid against until cleared. There was therefore strong ground for rebutting any inference as to implied agreement that the banker should or might take the cheques for his own, which was a necessary though unexpressed element in the Gordon judgment. Again, the idea of the banker so doing was precluded by the negation of any power to draw against cheques before clearing, described by Lord Lindley as an inevitable consequence of the ordinary crediting as cash. Incidentally, this feature is particularly valuable, as illustrating the method by which the customer may be debarred from exercising this right when cheques are credited as cash.

The contention that the bank had exceeded their functions as collecting banker or committed an independent conversion by altering the general into a special crossing, was really met by the quotation from Lord Macnaghten at the end of Bigham, J.'s, judgment, while the attempt to read "holder" in sec. 77 (2) as meaning "holder for value," and so excluding the collecting banker from the power of crossing specially a cheque in his hands, crossed generally, was palpably hopeless. The question whether the defendant bank by forwarding the cheques for collection to Williams Deacon and Co., with whom they had a loan account, had subjected them to a lien in the hands of that bank and so acted inconsistently with the position and duties of an agent, denounced by Bigham, J., as a fanciful point, on the ground that no such lien could be asserted calls for more serious consideration. Collection is not inconsistent with lien, is, indeed, the banker's usual opportunity for asserting it. *Cf.* Currie *v.* Misa, 1 A.C., at pp. 565, 569, 573. A banker receiving bills for collection from another banker is agent for that banker, not for the latter's customer, and, in the absence of distinct notice that such bills are the property of such customer and in the hands of the remitting banker only for collection, he may treat them as that banker's property and subject them to a lien for the indebtedness of the remitting banker to himself. Johnson *v.* Robarts, L.R., 10 Ch., 505; *Ex parte* Armitstead, 2 G. and J., 371; *Ex parte* Froggatt, 3 Mont. D. and De G., 322; Prince *v.* Oriental Bank Corporation, 3 A.C., p. 325. That subjecting cheques to such a lien is an aberration from duty on the part of a collecting banker has never been decided, but it might well be held so. The case contains some remarks as to "account payee." The judge lays down quite correctly that the words do not constitute

an unauthorised addition to a crossing such as is prohibited by sec. 78. He rather minimises their effect in other directions. True, they do not primarily concern the paying banker, but the question has never been settled whether he can absolutely and with impunity ignore the words "account payee" or the like, when endorsements on the cheque show obviously that it is not being collected for the account indicated. So with regard to the collecting banker, Bigham, J., says the words are a mere direction to the receiving banker as to how the money is to be dealt with after receipt. But the money, when received, must go to the account for which the cheque was received, and therefore the words affect the collecting banker at the earlier stage of the receipt of the cheque. The point was not directly material in this case, because it was the collecting bank themselves who marked the cheque to their own account, but as shown by Bevan *v.* National Bank, *post*, p. 135, and as is now generally recognized, no collecting bank should take a cheque so marked for any account other than that indicated, and they will be held guilty of negligence and lose the protection of sec. 82 if they do so.

MIDLAND COUNTIES DISTRICT BANK, LIMITED, *v.* ATTWOOD.

1905. Reported. [1905] 1 Ch. 357. Journal, Vol. XXVI, p. 35.

Company—Voluntary Winding-up—Effect on Employment of Officers and Servants of Company—Distinction between Voluntary and Compulsory Winding-up.

This was a motion for an injunction to restrain the defendant, a former employee of the plaintiff company, from committing a breach of an agreement for service of November 10th, 1891, which raised an important question as to the effect of a voluntary winding-up on contracts of this nature. The facts were as follows:—By an agreement of November 10th, 1891, between the plaintiff bank, by its then name of the Nottingham and District Bank, Limited, of the one part and the defendant of the other part, the defendant agreed to serve the bank as manager of their branches at Ilkestone and Eastwood "or elsewhere, and in the same or such other capacity as the said bank shall direct." By Clause 2 of this agreement it was provided that the defendant should not "during the continuance hereof engage in any other business or calling whatsoever without the previous written consent of the said bank." After providing for the salary that was to be payable to the defendant, and for the termination of the agreement by one calendar month's notice on either side, Clause 7 was as follows:—The defendant "shall not within a year of the termination of this agreement, whether by notice or under the terms of the next clause," enter into the service of or in any way act for any bank carrying on business within a radius of five miles of Ilkestone, of Eastwood, or any branch of the said bank to which the defendant might thereafter be appointed as manager. A sum of £500 was also fixed as liquidated damages in case of any breach by the defendant of this clause. By Clause 8 the bank were empowered to put an end to the agreement in the event of the defendant being guilty of misconduct in connection with his duties. The defendant ceased to be manager of the Ilkestone and Eastwood branches, and became, and until quite recently continued to act as, the manager of the plaintiffs' branch bank at Derby. By an agreement of November, 1904, the Birmingham District and Counties Banking Company, Limited, agreed to acquire the whole of the assets, undertaking,

and goodwill of the plaintiff bank as from December 31st, 1903, and for this purpose it became necessary to wind up the plaintiff bank, and accordingly by a special resolution, duly passed and confirmed on November 18th and December 3rd, 1904, it was resolved that the plaintiff bank be wound up voluntarily, and that two named persons should be appointed liquidators to adopt the agreement of November, 1904, and carry the same into effect on behalf of the plaintiff bank. The defendant was instructed to assist in the transfer of the business to the Birmingham District and Counties Banking Company, Limited, but on December 3rd, 1904, he left the plaintiffs' branch bank at Derby, and subsequently entered the service of the Nottingham Joint Stock Bank, Limited, for the purpose of opening and managing a new branch bank for that company at Derby. On December 5th the plaintiff bank gave the defendant a month's notice to determine their agreement of service with him, and commenced the present action to restrain the defendant from acting for the Nottingham Joint Stock Bank, Limited, or any other banking company at Derby or within five miles round, in breach of his agreement with the plaintiff bank of November 10th, 1891. The Birmingham District and Counties Banking Company, Limited, was also a plaintiff in the action.

Mr. Justice Warrington, after stating the facts as above, continued:—On these facts the plaintiffs would plainly be entitled to the relief they seek, unless the defendant has some defence in point of law. The only defence relied upon is founded upon the contention that the voluntary winding-up of the employing company operated in itself as a wrongful dismissal of the servants of the company, including the defendant, and that he is not, under the circumstances, bound by the restrictive provisions of Clause 7. The question I have to determine is whether this defence is well founded. It is well settled that an order for the compulsory winding-up of a company operates as a notice to dismiss the servants; and it has been decided by the Court of Appeal that the appointment by the Court of a receiver and manager in a debenture-holder's action has the same effect—Reid *v.* Explosives Company, Limited, 19 Q.B.D., 264. In order to determine whether a voluntary winding-up is to have that effect, one must consider what there is in the events I have mentioned which could terminate the agreement of service. It is contended for the defendant that it is the change in the nature of the business carried on by the employer. On the other hand, it is contended for the plaintiffs that the change in the nature of the business is immaterial; that the circumstances in the cases I have mentioned which cause the termination of the relation is the change in the personality of the employer; the latter is, in my opinion, the correct view. If the business had ceased altogether that would have been no breach by the employer of his

agreement with the servant, provided he had continued to pay his salary—see Turner *v.* Sawdon, 1901, 2 Q.B., 653; and it seems to me, therefore, that the change from a going banking business to one that is being carried on with the view to a beneficial winding-up could not have the effect contended for. On the other hand, a change of personality certainly puts an end to the contract of service. See Brace *v.* Calder, 1895, 2 Q.B., 253. This change of personality appears to me to take place in a compulsory winding-up. The business is from the date of the winding-up order carried on by the Court for the purpose of liquidation with the assistance of the Official Liquidator, who is an Officer of the Court. Is there, in a voluntary winding-up, a change in the personality of the employer? In my opinion there is not. In that case the assets of the company remain under the control of the company; the liquidator is an officer of the company; the business may even be continued by the directors, if either the company or the liquidators so think fit. The governing section of the Companies Act, 1862, as to the effect of a voluntary winding-up on the *status* of the company is sec. 131, which runs thus:—"Whenever a company is wound up voluntarily, the company shall from the date of the commencement of the winding-up cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof." * Those later words imply that for the beneficial winding-up of the company the company does continue to exist. Then the section, after providing that transfers of shares and alteration in the *status* of members shall be void, continues, "but its corporate state, and all its corporate powers, shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up." If, therefore, there is no authority binding me to decide otherwise, I should be prepared to hold that the voluntary liquidation did not operate to dismiss the servants of the company. Is there any such authority? The only case referred to as such is Shirreff's case in L.R., 14 Eq., 417, and it is quite true that in that case Lord Romilly said:—"I am of opinion that the resolution to wind-up the company *ipso facto* put an end to Shirreff's employment as manager, and was equivalent to his dismissal." But the point was not argued. It was assumed that Shirreff's employment had been determined, as, in fact, it had been, for not only had the company been wound up, but Shirreff himself had been appointed liquidator and received £400 for his services. The only question that was argued was whether he was entitled to prove for a certain sum payable to him under the articles of association in case he should be dismissed from his office as manager. I cannot, therefore,

* See same section re-enacted Companies (Consolidation) Act, 1908, 8 Edw. 7, c. 69, sec. 184.

regard that case as an authority binding me to decide contrary to my own opinion. In Reid *v.* Explosives Company there had been an appointment of a receiver and manager by the Court in a debenture-holder's action, followed by a voluntary liquidation, and Mr. Justice Manisty had held—but for what reasons I cannot ascertain—that the latter event had operated to dismiss the plaintiff, who had been in the service of the defendant company, but it was unnecessary to decide the point, because the same learned judge decided that the appointment as a receiver and manager had had that effect; and in the Court of Appeal the point was not decided, and I infer that Lord Esher, at all events inclined to the view that, inasmuch as in a voluntary liquidation, the liquidator is appointed by, and is an officer of the company, there would not be such a change in the personality of the employer as to dismiss the servants. On the whole, I am of opinion that the defence fails, and that the injunction must go as asked by the notice of motion.

Note.—The distinction pointed out in this case between a voluntary winding-up, which does not operate as a discharge of the officers and servants of the company, because there is no change in the personality of the employer, and a compulsory winding-up which, by reason of such change, does operate as a wrongful dismissal of the officers and servants of the company, releasing them from any obligation they may have undertaken not to take similar employment elsewhere or engage in rival business is illustrated by the subsequent case of Measures Brothers, Limited, *v.* Measures, 1910, 1 Ch., 336. In that case, the defendant was a director of the company, and, by agreement dated July 14th, 1903, he agreed to hold office for seven years at a fixed salary, and, so long as he did so, and for seven years after ceasing to do so, not to be directly or indirectly concerned in any competing company or business. On April 20th, 1909, a receiver and manager was appointed who gave notice to the defendant that his services were no longer required and ceased to pay his salary. On October 13th, 1909, a compulsory winding-up order was made. The defendant started a rival business. Joyce, J., refused to restrain him from so doing. In the course of his judgment he said:—"In the simple case of the manager of a company for a term, the making of a winding-up order or the appointment of a receiver and manager has the effect of a wrongful dismissal of such manager, and he is entitled at once to sue for wrongful dismissal or breach of contract, whatever it may be." He held that the company were not entitled to an injunction, as they could not perform their part of the contract.

An appeal against this judgment was dismissed by a majority of the Court of Appeal. See Solicitors' Journal, vol. 54, p. 521, *cf.* General Billposting Co. *v.* Atkinson, 1909, A.C., 118.

[IN THE COURT OF APPEAL.]

EMBIRICOS *v.* THE ANGLO-AUSTRIAN BANK.

1905. Reported. [1905] 1 K.B. 677. Journal, Vol. XXVI, p. 234.

Conflict of Laws—Title to Cheque conferred by foreign Law notwithstanding forged Endorsement—Bills of Exchange Act, secs. 24 and 72—Right to retain Cheque—Whether right to sue prior Parties thereon—Query.

This was an appeal by the plaintiffs against the decision of Mr. Justice Walton reported in 20 The Times Law Reports, 794.

The case raised an important question as to the law affecting cheques and other negotiable instruments when there has been a forged endorsement in a foreign country, giving by the law of that country a good title to a holder for value, but not giving a good title by the laws of England. The question was whether the foreign law or the English law was to prevail. Mr. Justice Walton held that the foreign law must prevail. The plaintiffs appealed. The facts are fully stated in the judgment of Lord Justice Vaughan Williams.

The Court delivered judgment dismissing the appeal.

Lord Justice Vaughan Williams read his judgment as follows:—This action was brought by Messrs. L. and M. Embiricos against the Anglo-Austrian Bank to recover damages for the wrongful conversion of a cheque. The action was tried before Mr. Justice Walton, without a jury, and he gave judgment for the defendants. The appeal is against that judgment. On March 6th, 1903, a Rumanian bank drew a cheque on a London bank payable to the order of the plaintiffs. The plaintiffs at Braila, in Rumania, endorsed the cheque to G. Embiricos and Co. and wrote to them in London enclosing the cheque. The cheque was, however, stolen from the envelope by a clerk of the plaintiffs. On March 9th, 1903, the cheque was presented at the bank of Messrs. Schelhammer and Schatterer, in Vienna, by a person who desired that it might be cashed. It then bore the endorsement G. Embiricos and Co. in addition to the special endorsement to that firm by the plaintiffs. The endorsements were apparently regular and in order, but the endorsement of G. Embiricos and Co. was

in fact a forgery. Messrs. Schelhammer and Schatterer cashed the cheque and on the same day endorsed it to the defendants and posted it to them in London, where they cashed it at the bank on which it was drawn. According to an affidavit made as to the Austrian law by a doctor of law of the University of Vienna, "The holder of a cheque which he has bought *bonâ fide* without gross negligence and for value is identified as the proprietor of the cheque and entitled to the proceeds thereof against all the world, notwithstanding that the cheque has been previously stolen, and notwithstanding that the endorsement has been forged." The Lord Justice then summarised the judgment of Walton, J., which proceeded on the following grounds:—1. That the transfer of the cheque to the Vienna bank gave that bank a good title to it, which an English Court was bound to recognize; that bank gave an equally good title to the defendants, who, when they presented the cheque for payment were dealing with their own property, not the plaintiffs' and therefore committed no wrong. 2. That this was so because the rule that title to a moveable chattel by assignment is governed by the law of the country where the chattel is situate at the time of the assignment, applies to a bill of exchange, and was held so to do in Alcock *v.* Smith, 1892, 1 Ch., 238. 3. That the case was covered by sec. 72 of the Bills of Exchange Act, "Interpretation" in sub-sec. (2) including "legal effect." The Lord Justice went on to say: I think that the view taken by Mr. Justice Walton of the effect of the decision in Alcock *v.* Smith, that the rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place, applies to a bill or a cheque, and applies to the transfer of bills or cheques in cases where the transfer is by endorsement, is right; although in the case of Alcock *v.* Smith the transfer was not by endorsement, but by process of law in the shape of a judicial arrestment. This conclusion seems sufficient to negative the cause of action in the present case, which is an action by payee against an endorsee, who claims under a forged endorsement giving the endorsee a good title in the country where the endorsement was made. But it would manifestly be an unsatisfactory state of the law if the legal result is that the endorsement is effective to give the endorsee a good title as against the payee, but not effective according to English law to give such endorsee a good title against the drawer of the cheque or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such endorsement is good as against the original parties to a negotiable instrument having regard to the contractual liability incurred by them thereby. I do not think that Alcock *v.* Smith decides this question; on the contrary, it seems to me that the judgments of Mr. Justice Romer and the Court of

Appeal both disclaim so doing, and, further, it seems to me that the law as laid down by Mr. Justice Pearson in Smallpage's case, 30 Ch.D., 598, and by Mr. Justice Lush in Lebel *v.* Tucker, L.R., 3 Q.B., 77, 83, is, in effect, authority to the contrary. At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged endorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any endorsement recognized by the law of England, even though such endorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract. If the contract of the drawer of a cheque or acceptor of a bill were limited to payment on endorsements valid by the English local law an argument might be raised that, even though the endorsement abroad was valid to legalise the possession by the endorsee claiming under the foreign endorsement, yet he would be guilty of a conversion if he used a negotiable instrument to the possession of which he was entitled for the purpose of obtaining and did obtain payment from an original party to the negotiable instrument from whom he could not have recovered by process of law. User of a chattel by a person entitled to possession in such a manner would perhaps give a right of action for money had and received. I, however, have come to the conclusion that as between the payee and this endorsee there is no cause of action for conversion, and that the judgment of Mr. Justice Walton must be affirmed. It is to be observed that our decision in this case does not increase the liability of the bank upon which the cheque was drawn and which paid the cheque. I wish to add that I am not satisfied that, having regard to the terms of sub-sec. 2 of sec. 72 of the Bills of Exchange Act, 1882, such section is conclusive of the present case. I wish also to add that I do not think that sec. 24 governs the case of an endorsement abroad.

Lord Justice Romer said that he had arrived at the same conclusion. The only question was one of conversion. Did the defendants convert the property of the plaintiffs? If the plaintiffs, when they brought the action, had no title to the cheque, the action must fail. If the foreign law applied, the defendants had acquired a good title to the cheque as against the plaintiffs. The question was whether the foreign law did apply. It had been contended that bills of exchange and cheques were wholly outside the general rule of international law which applied to movable chattels. In his Lordship's opinion that contention was wrong, for the reasons which he had given in his judgment in Alcock *v.* Smith, a judgment which was affirmed by the Court of Appeal. He could see no reason for departing from what he then said. No

subsequent case had, he thought, thrown any doubt on the correctness of his decision. It might, of course, well be that by reason of some special English law or enactment the English Courts might be unable to recognize that rule of international law in special cases. But his Lordship knew of no such English law or enactment. Sec. 72 of the Bills of Exchange Act certainly had not that effect. Indeed, it recognized the general principle, especially in sub-sec. 2. The proviso to that sub-section, whatever might be its scope and effect, did not touch the present case. Sec. 24 was only a statement of the general English law, which was local for the purposes of the present case, and it had not the effect of controlling the general rule of international law.

Lord Justice Stirling concurred. He agreed with what was said by Mr. Justice Walton and by his brethren Lord Justice Vaughan Williams and Lord Justice Romer, except that he desired to reserve his opinion about sec. 72, to which he was inclined to attribute more weight than they did.

Note.—This case, like the previous one of Alcock *v.* Smith, 1892, 1 Ch., 238, therein referred to, affords a curious illustration of the dual nature of a bill of exchange, its chattel existence and its contractual capacity. *Quâ* chattel, it is only reasonable that incidents of transfer should be regulated by the law of its temporary abiding place; *quâ* contract, it is natural that a man should only be held to liabilities which he has assumed in accordance with the only law with which he is presumed to be conversant. It is a startling proposition that a man in England who has drawn or accepted a bill on the basis that he was not bound to pay on a forged endorsement should be called upon here to pay even an innocent person whose title was avowedly derived through forgery. It is therefore not surprising that both in this case and in Alcock *v.* Smith, the Court sedulously refrained from deciding the question, not really before them, whether the right to sue passes with or drops away from the material, chattel part of the bill when it changes hands under these abnormal and local conditions.

With regard to the sections of the Bills of Exchange Act referred to in the judgment, the difficulty of applying them arises from the fact that the framers of the Act probably never contemplated the existence of a foreign law so irreconcilably inconsistent with our own on a subject of such international interest as bills of exchange. Sec. 24 ostensibly puts the right to retain the bill on precisely the same footing as the right to sue on it, where forged endorsement intervenes, recognizing no distinction between the chattel and contractual elements. True, the section is subject to the provisions of the Act, and sec. 72 (2) is adduced as introducing an exception in the case of foreign negotiation.

If and so far as that section is applicable, it would certainly appear to bear rather on the contractual than the material element in the bill. But, admitting that "interpretation" in that section includes the legal effect of an endorsement, it must surely be that, for contractual purposes, at any rate, "endorsement" must mean a genuine endorsement; the forging a man's name on the back of a bill is not in any sense describable as his or an endorsement, certainly not for any purpose of the Bills of Exchange Act, which is careful to accentuate the distinction, as, for instance, in sec. 24.

In Embiricos *v.* Anglo-Austrian Bank, there was a genuine endorsement following the forgery, and there might be some show of reason for holding that the "interpretation" of a genuine endorsement might sustain its validity notwithstanding that endorser's title rested on a prior forgery. But the evidence of the Austrian expert quoted in the judgment enunciates the proposition in its crudest form, namely, that a person taking a cheque without negligence and for value acquires absolute title to the cheque and its proceeds, even though he take it from the actual forger of the endorsement. Since "payor" in the proviso to sec. 72 (2) is confined to the acceptor of a bill (see Alcock *v.* Smith), it would follow, if this foreign law is to govern here, that such a person might recover on an English cheque against the drawer, a state of things difficult to contemplate, especially in view of possible independent claim on the part of the true owner in the ordinary acceptation of the term. The matter is one which might well receive attention from any International Conference dealing with Bills of Exchange.

The allusion to the paying bank not being prejudiced is, of course, founded on sec. 60.

NATIONAL PROVINCIAL BANK OF ENGLAND LIMITED, *v.* BASDEN.

1905. Reported. Journal, Vol. XXVI, p. 238.

Money borrowed by Receiver and Manager— Personal Liability.

This action was brought for payment of the balance of a loan account amounting to £743. The sum of £750 was lent originally, and the interest had been paid upon that sum up to the preceding 1st February. The defendant had, in addition to the loan account with the plaintiff bank, a current banking account, and from that current account interest was from time to time debited up to the above date. At the date of the writ there was a small sum to the defendant's credit on his current account, for which the plaintiffs had given credit. When the loan was first applied for, Mr. Basden occupied the position of receiver and manager of a company called the Milton Paper Company, Ltd. That company had defaulted on its debenture interest, and thereupon the debenture holders applied to the Court, and Mr. Basden was appointed receiver and manager. It was afterwards found that for the purpose of carrying on the business of the company it would be necessary to get some money, and the Court made an Order giving Mr. Basden liberty to borrow a sum not exceeding £1,000, the sum borrowed to be a charge upon the assets of the company. Mr. Basden applied to the plaintiff bank, and they ultimately advanced a sum upon loan, which amounted to £750. At the latter end of 1904 it was found that owing to some claims of the landlord, which took priority over the rights of the debenture holders, the debenture holders would not get the benefit of their charge upon the company's property, and thereupon their interest in the liquidation became small, and Mr. Basden, as receiver and manager, did not apply for any further extension of his charge under the Order of the Court, and his receivership and managership came to an end. The bank, which had repeatedly pressed for repayment, required Mr. Basden to pay off the loan, and defendant then took up the position that he was only receiver and manager, and that the bank could not look to him personally for the repayment, but must look to the assets. Defendant did not suggest that there was any actual stipulation

that the bank was not to look to him. Defendant either suggested that he never thought he would be liable, or that by signing letters as receiver and manager he was not in law liable. Counsel for the plaintiff bank quoted the case of Burt *v.* Bull in the Court of Appeal,* when the Court, in dealing with a case of a receiver and manager, laid down the proposition that a receiver and manager who carried on a business and gave orders and borrowed money did so in law *primâ facie* on his own credit. Unless he clearly and expressly stipulated that he did not pledge his credit, the law would deem that his credit was pledged.

Mr. Justice Lawrence said it was perfectly clear on the authorities that, especially where there were no assets, a receiver and manager was responsible for a debt such as the one in this case, and that it was his personal credit that was pledged. That being so, he gave judgment for the plaintiffs for the amount claimed, with costs.

Note.—This case is of dubious authority in view of the later one *re* A. Boynton, Ltd., Hoffman *v.* A. Boynton, Ltd., *post*, p. 226, supported as the latter is by the *dictum* of Cozens-Hardy, L.J., in *In re* Glasdir Copper Mines, Ltd., therein cited.

* 1895, 1 Q.B., 276.

VINDEN AND ROGERS *v.* HUGHES.

1905. Reported. [1905] 1 K.B. 795. 21 Times L.R. 324. Journal, Vol. XXVI, p. 240.

Bills of Exchange Act, sec. 7 (3)—Payee a fictitious or non-existing Person.

THIS was an action to recover a sum of £487, the value of some 27 cheques drawn by the plaintiffs and cashed by the defendant in the circumstances hereinafter stated, and raised an interesting question under sec. 7, sub-sec. 3 of the Bills of Exchange Act, 1882, which provides that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." The facts were as follows:—The plaintiffs were salesmen in Covent Garden market, and the defendant a draper in Brixton Road. The plaintiffs had in their employment during the years 1896 to 1903 a cashier and confidential clerk named Rowland Cross; part of his duties was to fill up cheques payable to the order of customers of the plaintiffs (mostly growers for whom the plaintiffs had sold fruit) with the names of the customers and the amounts payable to them respectively, and to obtain the signature of the plaintiffs to such cheques and then to post the cheques to the customers. During the years 1901, 1902, and 1903 Rowland Cross drew these 27 cheques, amounting in all to £487, payable to various habitual customers or order. Except in one instance, referred to in the judgment, there was at the time no money due from the plaintiffs to any of such customers, and the sums for which Cross drew the cheques were purely fancy ones. He obtained the signature of the plaintiffs thereto, and then, instead of posting them to the various customers, took them away and appropriated them, and, having forged the endorsements, obtained cash for them from the defendant, who was a neighbour of his, and at whose shop Rowland Cross and his wife were in the habit of dealing. The defendant passed these cheques through his own banking account, and had the proceeds placed to his credit. Some time in 1903 the plaintiffs had occasion to dismiss Cross, his frauds were discovered, and he was prosecuted and convicted. No imputation was made against the defendant, who had also been deceived by Cross, a customer whom he had been willing to oblige by changing cheques for him, and whom he had

at the time every reason to believe to be a respectable person, and the question was argued as one of law—viz., which of these two innocent persons was to suffer through the fraud and forgery of Cross.

Mr. Justice Warrington, in the course of his judgment, said the question he had to determine was what was the true construction of sec. 7, sub-sec. 3, of the Bills of Exchange Act, 1882, as applied to the facts of this particular case? In other words, he had to decide whether the payees in these cheques were "fictitious or non-existing persons" within the meaning of that sub-section. Having stated the facts, his Lordship said that, with the exception of one cheque for £20 for an amount actually due to the particular customer at the time it was drawn, and in respect of which the defendant had paid £20 into Court, the case he had to deal with was the case of cheques where no money was actually owing to the customers at the time they were drawn, and as to those cheques was the person whose name had been inserted by Cross a "fictitious or non-existing person" within the meaning of the Act? At first he had been inclined to think that the case was covered by the second branch of the judgments in Bank of England *v.* Vagliano Brothers, 1891, A.C., 107, but a further and closer examination of that case had led him to the conclusion that it was not. Independently of authority what did "fictitious" mean? It could not mean fictitious in the abstract; the Court must look at the circumstances of the case in order to discover whether the name of the person mentioned in the bill of exchange or cheque was the name of a fictitious person, having regard to the facts of the case. In the present case, if one considered the position of the plaintiffs when signing these cheques, there was no fiction about it, it was a perfectly real and *bonâ fide* transaction; the plaintiffs believed they owed the sum of money named in the cheques to the persons whose names appeared therein as payees, and they signed the cheques in that belief, and it was only when they discovered the frauds of their clerk that there was any fiction in the matter, or anything otherwise than in accordance with their intention. The fraud perpetrated by Cross on the plaintiffs had, in his Lordship's opinion, nothing to do with the construction of the Act; what the Court had to look to was the state of things at the time the cheques were drawn; and at the time these cheques were drawn the plaintiffs intended to pay the persons named therein, who were their customers and not fictitious persons. Now was there any authority which prevented him from so holding? His Lordship thought there was not. In Clutton *v.* Attenborough and Sons, 1897, A.C., 90, the House of Lords had not to consider the meaning of the word "fictitious," and that decision was not applicable to the present case. In Bank of England *v.* Vagliano Brothers

the facts were very special and peculiar, and the bill in question was held not to have been drawn at all, and, there being no drawer in fact, the use of the name of a payee was a mere fiction; and this was the explanation of Lord Herschell's observations which had been much relied on by the defendant's counsel. Lord Herschell, at page 152 of the report, said this:—"Do the words 'where the payee is a fictitious person' apply only where the payee named never had a real existence? I take it to be clear that by the word 'payee' must be understood the payee named on the face of the bill; for, of course, by the hypothesis there is no intention that payment should be made to any such person. Where, then, the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not—that it is an entry made for the purpose of pretending that the transaction took place which is represented by it." Then a little lower down he says:—"It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person." Those passages, which were much relied on by the defendant's counsel, would be satisfied by a case in which the drawer of a cheque put into it the name of a person who existed, but whose name was used "by way of pretence only." Did the plaintiffs draw these cheques using the names of their customers by way of pretence only? In his Lordship's opinion it was impossible on the facts of this case to come to any such conclusion. His Lordship therefore held that the payees in these cheques were not "fictitious or non-existing persons," and that the fraudulent endorsements by Cross were no authority to the defendant to hold these cheques, and that he was therefore liable to the plaintiffs for the loss that had been occasioned by this fraud. In the view his Lordship had taken of the law it was not necessary to go into the question whether the defendant was a "holder" of these cheques "in due course"; but he should wish to add that there was nothing in the evidence which in any way reflected on the defendant's *bonâ fides* in the cashing of these cheques. There must be judgment for the plaintiffs with costs

Note.—This case and the earlier ones of Clutton *v.* Attenborough and Bank of England *v.* Vagliano Brothers, together with the subsequent one of North and South Wales Bank *v.* Macbeth, *post*, p. 168, constitute, so to speak, the literature of the fictitious

payee. Prior to this case there prevailed an impression, not unreasonably derived from many expressions in Vagliano's case, that at least one test of fictitious payee was whether the nominal payee, had he got hold of the document, could have enforced it. That, however, is now shown not to be a true criterion, the crucial point to be looked at, anyway with regard to cheques, is whether the drawer, that is to say the signatory or originator of the document as an effective instrument, not the mere fraudulent scribe who writes in the name of the payee and otherwise frames the body of the cheque for his own ends, intended a specific existing individual, indicated as payee in the cheque, to receive the money by himself or a transferee. If so, that payee is not a non-existing or fictitious person, albeit the fraudulent scribe never intended him to get the cheque or any benefit from it, and though by reason of the absence of any consideration between him and the drawer, he could never have enforced the cheque, had he got hold of it.

The distinction between this class of cases and that which in Clutton *v.* Attenborough was held to render the cheque payable to bearer is somewhat delicate. There fraud resulted in the issue of a cheque payable to "George Butt" or order. The signatory intended some person of that name to receive the money, but no particular individual was present to his mind except as an unknown person who was fraudulently represented to him as having a claim upon him, to be satisfied by the cheque. In this case, as explained in North and South Wales Bank *v.* Macbeth, the House of Lords held "George Butt" to be "non-existent" if not "fictitious," and the cheque payable to bearer. The dividing line seems, that though in both cases the issuer contemplated that someone of the name would, either by himself or a transferee, obtain the money, in the one case it was a specified individual actually known to him; in the other an unrecognized indefinite character answering to that name, really only present to his mind as an unknown creditor, and, not being such, not inaptly termed not existing, though individuals of that name are doubtless to be found somewhere. Both cases have to be reconciled with Vagliano's. It is not easy; nor is the process facilitated by the judgments, which dwell on the dissimilarity of the facts rather than demonstrate the legal distinction. Possibly the best justification for the liability of the acceptor is the general assumption of responsibility involved in that character, not only for ultimate payment, but for the genuineness and regularity of most incidents of the bill.

[IN THE HOUSE OF LORDS.]

THE LORD MAYOR, ETC., OF SHEFFIELD, *v.* BARCLAY AND OTHERS.

1905. Reported. [1905] A.C. 392. Journal, Vol. XXVI, p. 420.

Forged Transfer of Stock—Request to register—Liability to Company—Warranty or Agreement to indemnify.

THIS was an appeal from a judgment of the Court of Appeal (Lords Justices Vaughan Williams, Romer, and Stirling), reported, 1903, 2 K.B., 580, which reversed a judgment of the Lord Chief Justice dated October 27th, 1902, in an action wherein the appellants were plaintiffs and the respondents were defendants. The Lord Chief Justice adjudged that the corporation should recover from the bank £10,471 5s. 11d. and certain costs. The Court of Appeal reversed this decision. The House of Lords now reversed the decision of the Court of Appeal and restored that of the Lord Chief Justice, holding the bank liable to the corporation. The case involved the question, constantly arising in various forms, which of two innocent persons should suffer from the fraud of a third. The facts are stated in the judgments, most fully in that of Lord Davey, and were briefly as follows:—Prior to 1893, two persons, Timbrell and Honnywill, were trustees and joint registered owners of Corporation of Sheffield stock. Timbrell applied to Barclays for a loan on the security of the stock. He forged Honnywill's name to a transfer thereof in favour of Mr. Barclay, a member of the bank, and on such security obtained advances. On April 11th, 1893, Barclays sent in this transfer to the corporation for registration in the usual way. The accompanying letter, though spoken of in some of the judgments as a "demand," was really in the following terms:—"Messrs. Barclay, Bevan, Ransom and Co. present their compliments to the Registrar of the Sheffield Corporation and beg to send enclosed the transfer of £8,200 3½ per cent. 1883 stock and will be obliged by his registering the same in the company's books in the name of their Mr. E. E. Barclay, sending them the new certificates in due course." Mr. Barclay was accordingly registered and a certificate issued to him. The loan was promptly repaid, for on April 28th, 1893, Mr. E. E.

Barclay executed a transfer of the major part of the stock to one nominee of Timbrell's on his instructions, and on May 11th of a small balance to another such nominee in like manner. These nominees were duly registered, and on June 1st, 1893, the corporation issued certificates to them for the supposed amounts so transferred. In 1899 Timbrell died and the frauds were discovered. In 1901, Honnywill brought an action against the Sheffield Corporation for rectification of the register, restoration thereto of his name as holder of the stock, payment of back dividends, and other relief. The title of the transferees from E. E. Barclay could not, of course, be disturbed, the Corporation being estopped from disputing it by the issue of the certificates to them. Judgment was given in favour of Honnywill, and as the corporation had either to allot him other stock or purchase it for him, and pay back dividends and interest, this involved them in a loss of £11,847 17s. 5d. This sum they claimed against Barclays, on the ground that by sending in the forged transfer for registration, with the accompanying "demand," they had either warranted it as genuine or had impliedly undertaken to indemnify the corporation against consequent loss in the event of its proving to be otherwise; but at an early stage it was admitted that so far as warranty was concerned, that ground of claim was barred by the Statute of Limitations, the action not having been commenced till more than six years after the forged transfer had been sent in for registration. It was on the claim for indemnity that the action was finally decided against the bank. The following are the material parts of the judgments:—

The Lord Chancellor (Lord Halsbury): My Lords, in this case two persons, Timbrell and Honnywill, were joint owners of corporation stock created under a local Act of Parliament. Timbrell, in fraud of Honnywill, forged a transfer of the stock, and borrowed money on the security of the stock which the transfer was supposed to have transferred. A bank which lent the money sent the transfer to the proper officer of the corporation, and demanded, as they were entitled to do, if the transfer was a genuine one, that they should be registered as holders of the stock. The corporation acted upon their demand; they transferred the stock into the names of the bank, and the bank in ordinary course transferred it to holders for value. The corporation also, in ordinary course, issued certificates, and the holders of these certificates were able to establish their title against the corporation, who were estopped from denying that those whom they had registered were the stockholders entitled. Honnywill, after the death of Timbrell, discovered the forgery that had been committed, and compelled the corporation to restore the stock, and the question in the case is whether the corporation has any

remedy against the bank who caused them to act upon a forged transfer, and so render themselves liable to the considerable loss which they have sustained. Now, apart from any decision upon the question (it being taken for granted that all the parties were honest), I should have thought that the bank were clearly liable. They have a private bargain with a customer. Upon his assurance they take a document from him as a security for a loan, which they assume to be genuine. I do not suggest there was any negligence—perhaps business could not go on if people were suspecting forgery in every transaction—but their position was obviously very different from that of the corporation. The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries they like. If they find that an intended borrower has a co-trustee, they may ask him or the co-trustee himself whether the co-trustee is a party to the loan, and a simple question to the co-trustee would have prevented the fraud. They take the risk of the transaction and lend the money. The security given happens to be in a form that requires registration to make it available, and the bank "demand," as, if genuine transfers are brought, they are entitled to do, that the stock shall be registered in their name or that of their nominees, and are also entitled to have fresh certificates issued to themselves or nominees. This was done, and the corporation by acting on this "demand" have incurred a considerable loss. As I have said, I think if it were *res integra* I should think the bank were liable; but I do not think it is *res integra*, but is covered by authority. His Lordship discussed the case of Dugdale *v.* Lovering, L.R., 10 C.P., 196, which he considered in favour of the corporation and concluded by moving that the appeal be allowed.

Lord Davey, after stating the facts of the case and referring to the course of the litigation, proceeded as follows:—Before referring to the numerous authorities which have been cited, I will first state the grounds upon which I have come to the conclusion that the Lord Chief Justice was right and his judgment should be restored. Not much turns upon the particular provisions in the corporation's private Act of 1883 as to the transfer of their debenture stock or the keeping of the register or the issue of certificates of title. They for the most part follow the lines of the similar provisions in the Companies Clauses Act. I think

that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has in fact no title to require the appellants to do so. And it makes no difference that the appellants were not aware of the invalidity of the transfer or could not with reasonable diligence have discovered it. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request. Lord Davey then reviewed numerous cases which had been cited, particularly Simm *v.* Anglo-American Telegraph Co. and Anglo-American Telegraph Co. *v.* Spurling, 5 Q.B.D., 188, in which Lord Lindley, then Lindley, J., had laid down certain propositions, which had been adopted by the Court of Appeal in the present case, and up to the date of this decision had been generally accepted as governing the situation. These propositions, briefly put, were as follows:—(1) That the sending in a transfer for registration involved nothing more than a representation on the part of the person sending it in that he knew of nothing invalidating it. (2) That if any other effect could be attributed to the sending in the transfer, it could only be as constituting a warranty of genuineness, not an undertaking to indemnify, and that any claim as on a warranty was after six years barred by the Statute of Limitations. On these points Lord Davey said:—My Lords, I am of opinion that the case of Anglo-American Telegraph Co. *v.* Spurling was wrongly decided by Mr. Justice Lindley, and I respectfully dissent from both the propositions laid down by him and adopted by the Court of Appeal in the present case. I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine document, and I am disposed to think (though it is not necessary to decide it in the present case) that he not only affirms it is genuine but warrants that it is so. I am also of opinion that the authority keeping a stock register has no

duty of keeping the register correct, which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register. This point was decided by all the learned Judges who took part in the decision of the first case of Simm *v.* Anglo-American Telegraph Company. I will content myself with quoting the language of Lord Justice Cotton:—"The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense—that unless the company act upon a genuine transfer they may be liable to the real stockholder." True it is that the appellants, following what is now the usual practice, gave notice of the transfer which had now been brought in to the persons named as transferors, but they had no duty to do so, and it was done merely for their own protection. Experience in these cases shows, however, that it is a very poor protection. Lastly, it was said that this is not an action on a warranty, and that a warranty and a contract of indemnity are distinct, one important difference being the period from which the Statute of Limitations would run. That, of course, is so, and the appellants admit that if they were suing on the warranty their action would be out of time. But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires we should so hold. I agree with the Lord Chief Justice that as between these two innocent parties the loss should be borne by the respondents, who caused the appellants to act upon an instrument which turned out to be invalid. I am, therefore, of opinion that the appeal should be allowed and the judgment of the Lord Chief Justice restored, with costs here and below.

Lord Robertson concurred.

Appeal allowed.

Note.—This judgment of the House of Lords revealed a very serious and unanticipated danger to bankers. An advance on stock or shares can usually only be secured by having such stock or shares transferred to the lender, and, to be complete, the transfer must be sent in to be registered, always practically by

the transferee, to whom certificates are issued. As exemplified in this case, this subjects the banker or other lender to liability to indemnify the company or corporation should the transfer prove to have been forged and the real owner claim, as he has a perfect right to do, to be restored to the register, the company having to buy an equivalent amount of stock for him, if its issuing powers are exhausted; such real owner is also entitled to back dividends not received and interest thereon, all of which have to be included in the indemnity. This possibility of being called on for indemnity may hang over the banker's head almost indefinitely, long after he imagines the whole transaction closed and done with. Unlike a warranty, the cause of action only arises when the company suffer loss from being compelled to replace the stock, and the Statute of Limitations does not begin to run till then.

It will be noticed that in this case, the claim was not put forward till more than six years after the sending in of the transfer. In this case, the bank were comparatively fortunate in that they had their loan repaid, but cases might quite conceivably arise where a banker might lose the money twice; once by default of payment on the part of the borrower, and a second time by having to indemnify the company against the real owner of the stock.

It might have been suggested that the corporation was estopped from disputing the validity of the transfer by virtue of having issued a certificate to the bank. This is not, however, by the recognized principle that no estoppel can be held to exist where the party claiming it has by his own misrepresentation, albeit innocent, evoked the acknowledgment on which he bases his alleged estoppel. See per Lord Davey in Ruben and another *v.* Great Fingall Consolidated, Limited, 1906, A.C., 439, *post*, p. 132; Attorney-General *v.* Odell, 1906, 2 Ch., 47.

[IN THE HOUSE OF LORDS.]

WILLIAM BRANDT'S SONS AND COMPANY *v.* DUNLOP RUBBER COMPANY, LIMITED.

1905. Reported. [1905] A.C. 454.

Equitable Assignment of Debt—How constituted—Notice of Assignment—Non-compliance with Notice.

William Brandt's Sons and Co., and Kleinwort and Co. are bankers in London. Kramrisch and Co. were rubber merchants in Liverpool who banked both with Brandts and with Kleinworts. The following arrangement existed in both cases. When Kramrisch made a purchase of rubber at home or abroad, approved by the bankers, the bankers provided the necessary funds, and, by way of security, took delivery of the rubber to themselves. When the rubber was sold the bankers released it and gave Kramrisch and Co. a delivery order, relying on a written undertaking in each case that the price should be paid direct to them, and receiving an engagement in writing that in the meantime Kramrisch and Co. would hold the goods and the proceeds in trust on their behalf, and grant them "the sole and absolute lien on said goods and their proceeds" until they obtained full payment of the advance, together with their charges.

Towards the end of 1902 Kramrisch and Co. bought a parcel of rubber which they sold to the Dunlop Rubber Co. In connection with this purchase Brandts advanced £3,430. The rubber was delivered to the Dunlop Co. on January 5th, 1903, at their mills in Birmingham, known as "Para Mills."

With the goods there was sent an invoice on which there was stamped a note requesting the Dunlop Co. to remit the amount of the invoice to Brandts. There was a mistake of a few shillings in the figures, and the invoice was returned to Kramrisch and Co. for correction. The figures had originally been £3,263 16s. 4d.; the amount as corrected was £3,263 4s. 2d. After some correspondence Kramrisch and Co. sent the Dunlop Co. a corrected invoice for that amount, but the stamped direction for remittance to Brandts did not appear on the corrected invoice; and apparently the clerk at Para Mills, whose duty it was to attend to the correspondence, did not keep a copy of the original invoice or take note of the direction as to payment.

When the goods were delivered at Para Mills, Kramrisch and Co. sent to Brandts a printed form consisting of two parts: (1) a letter addressed by Kramrisch and Co. to the Dunlop Co.; and (2) a latter intended to be signed by or on behalf of the Dunlop Co., and to be returned by them direct to Brandts. This letter, which is referred to by Brandts as "the counterpart," was printed on the same sheet side by side with letter No. 1, but was readily detachable from it.

The printed form as filled up in writing with the corrected figures, but without signature by or on behalf of the Dunlop Co., was as follows:—"Kramrisch and Co., Liverpool, 6th January, 1903. Messrs. the Dunlop Rubber Company, Ltd. Dear Sirs,—We should thank you to kindly sign the attached letter and forward same to Messrs. Wm. Brandt's Sons and Co., London, E.C. Yours very truly, Kramrisch and Co." The attached letter was this:—"Para Mills, Birmingham, January, 1903. Messrs. Wm. Brandt's Sons and Co., 4, Fenchurch Avenue, London, E.C. Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to approval of goods, the amount of invoice—

£369 2s. 10d. for 8 }
£3,263 4s. 2d. for 75 } Packages raw rubber.

received to-day from Messrs. Kramrisch and Co., Liverpool, when due, direct to your good selves for account of Messrs. Kramrisch and Co. Yours faithfully." Brandts sent on this form entire enclosed in the following letter:—"Dated, London, 7th January, 1903. Dear Sirs,—Enclosed we beg to hand you a letter received from Messrs. Kramrisch and Co., Liverpool, referring to 8 packages India-rubber, amounting to £369 2s. 10d., 75 packages India-rubber, amounting to £3,263 16s. 4d., which Messrs. Kramrisch and Co. advise having forwarded to you. We request you to kindly return to us the counterpart duly signed by your good selves. And remain, dear Sirs, yours truly, (Signed) Wm. Brandt's Sons and Co. The Dunlop Rubber Company, Ltd., Para Mills, Birmingham."

The "8 packages India-rubber, amounting to £369 2s. 10d." were the subject of a separate transaction and had no reference to the present case. There was no mistake about that parcel, and the price was duly remitted to Brandts.

The clerk at Para Mills, who had charge of the correspondence there, was one A. G. Paterson, who was an assistant under Gooding, the manager at Para Mills. He was entrusted with the company's rubber stamp, which bore upon it the words "For the Dunlop Rubber Company, Ltd., Para Mills, John Gooding." When Paterson used the stamp he added his initials, A. G. P.

Paterson in due course received and opened Brandts' letter of January 7th, addressed to the Dunlop Rubber Company. He corrected the figures in the counterpart letter enclosed in it, and

advised Kramrisch and Co. that he had made the correction. He signed the counterpart with the company's rubber stamp, adding his own initials, and returned the counterpart so signed to Brandts. But he did not send a copy of the correspondence to the head office in London, from which all cheques were issued. Nor did he inform the head office of what he had done. He merely sent up the corrected invoice. The consequence was that instead of remitting the sum of £3,263 4s. 2d. to Brandts, as specially directed by Kramrisch and Co., the Dunlop Rubber Company, in compliance with a previous general order from Kramrisch and Co., paid the amount by cheque to Kleinwort and Co., who had not financed this particular transaction, and had nothing whatever to do with it. Ultimately Brandts wrote to the Dunlop Co. pressing for the remittance, which was then overdue. They replied on February 9th, 1903, that the amount had been paid, and added that they held Kramrisch and Co.'s receipt for it.

This action was brought by Brandts in the Commercial Court against the Dunlop Co. to recover the amount due. Walton, J., decided in favour of the plaintiffs. The Court of Appeal, however (Lord Alverstone, C.J., Collins, M.R., and Romer, L.J.), reversed his judgment, and dismissed the action with costs.

The plaintiffs appealed to the House of Lords.

The House of Lords reversed the judgment of the Court of Appeal, and restored the judgment of Walton, J., in favour of the plaintiffs, on the following grounds:—

1. That there was a good equitable assignment of the moneys from Kramrisch and Co. to Brandts.

Lord Macnaghten said:—"It is difficult to conceive a plainer case of an equitable assignment. As between Kramrisch and Co. and Brandts the case was complete and more than complete, without Brandt's letter of January 7th, and its enclosures. There was an undertaking that the money should be paid direct to Brandts. There was besides a declaration of trust. There was an engagement to give Brandts 'a sole and absolute lien,' that is, sole and absolute control and dominion over the proceeds of the goods."

He said that in the Court of Appeal the case had been treated mainly with reference to sec. 25, sub-sec. 6, of the Judicature Act, 1873, dealing with absolute assignments of *choses in action*, and referring to some remarks of the Lord Chief Justice, Lord Macnaghten continues, "why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does

not forbid or destroy equitable assignments or impair their efficacy in the slightest degree.

The Lord Chief Justice had stated that "the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." Lord Macnaghten holds that to be immaterial. He says "An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor."

Lord Macnaghten thought that the documents which passed between Brandts and the company would of themselves, and apart from Kramrisch and Co.'s undertaking and engagement given to Brandts, have constituted a good equitable assignment.

2. Those documents were notice to the company that Brandts were interested in the money, and of the equitable assignment by Kramrisch and Co. to Brandts.

Lord Macnaghten quotes Walton, J.: –"That was notice to Dunlops, and, in fact, was more than notice. It was notice to Dunlops that Messrs. Kramrisch had made over to Brandts the right to receive this sum of money, and had given to Brandts power to give a perfectly good receipt and discharge for it. It is more than notice, of course. It is notice *plus* a request that the company would acknowledge that notice by undertaking to pay."

Lord Macnaghten said Dunlops had received through Brandts a notice which no man of business could mistake, telling them, on Kramrisch and Co.'s express authority, that they are to pay to Brandts the money which they owe their creditors, Kramrisch and Co. "What more could be required? Dunlops disregard that notice, and pay the wrong people. They must pay the money over again, and pay it to the right person."

The other Law Lords concurred.

Appeal allowed accordingly.

Note. Dunlops paid Brandts, and subsequently recovered the amount paid to Kleinwort and Co., as money paid under mistake of fact. See Kleinwort, Sons and Co., *v.* Dunlop Rubber Co., in the House of Lords, *post*, p. 154.

[IN THE COURT OF APPEAL.]

In re W. TASKER AND SONS, LIMITED HOARE *v.* THE SAME COMPANY.

1905. Reported. [1905] 2 Ch. 587. Journal, Vol. XXVI, p. 497.

Re-issue of Debentures—Rights of Holders—Companies (Consolidation) Act, 1908, sec. 104.

THIS was an appeal against the decision of Mr. Justice Kekewich, reported, 1905, 1 Ch., 283, upon the further consideration of a debenture-holder's action.

In 1899 the defendant company, having power to issue first mortgage debentures up to £35,000, part only of which had been issued, and being in want of money, borrowed money from two gentlemen named Ashby and Herbert, and issued to the lenders debentures to twice the amount of their respective loans. The company paid off parts of these loans from time to time, and upon each occasion received back from the lender debentures of twice the value of the money so paid, and also, by request of the company, a transfer of those debentures executed by the lender in blank except as to his own name. From time to time the company received applications for new debentures. Whenever such an application was received, the company, on payment of the amount secured by the debentures, handed the debentures to the applicant, together with the transfers in respect thereof, with the blanks filled in by the company. In other cases, the company deposited the debentures as security with persons who had made advances, but without the transfers. All the holders of these debentures were set out in the second schedule, parts 1, 2, 3, and 4 of the Master's certificate, and their claim to be debenture-holders was adjourned into Court. The question was, whether the transaction above referred to was in effect a transfer of the debentures, or whether it was a new issue of debentures which had been discharged. The debentures as originally issued were secured by a trust deed, and it was provided by the conditions that all the debentures of the series should rank *pari passu* as a first charge on the property and undertaking of the company, and that the company should not be at liberty to create any mortgage or charge upon its undertaking in priority to or *pari*

passu with those debentures. It was contended on behalf of the plaintiff in the debenture-holder's action and of other debenture-holders specified in the first schedule to the certificate, as to whose rights there was no question, that the persons mentioned in the second schedule were not entitled to the benefits of the trust deed. Mr. Justice Kekewich said that the question was of some importance to those interested in the issue of debentures, and he thought it was a completely new question. The debentures specified in the second schedule might be perfectly good as against the company, but the question was whether they were entitled to rank *pari passu* with the debentures specified in the first schedule. His Lordship came to the conclusion that when the repayment was made the debt was gone, and that when the company borrowed further money, whether by depositing the debentures as collateral securities or by issuing them in the ordinary way, they really issued new debentures. Consequently the only person entitled to rank as holders of the issue of debentures for £35,000 were those mentioned in the first schedule. Some of the persons mentioned in the second schedule appealed.

The Court of Appeal dismissed the appeal, on the ground that when the debentures were returned to the company by Ashby and Herbert on repayment of instalments of the loan, together with the blank transfers, such debentures became spent or extinguished, and could not be re-issued so as to give the holders the right to rank *pari passu* with holders of debentures of the same series which had never come back to the company's hands. It had been contended that the returned debentures had been kept alive in the hands of the company, they holding the transfers practically as agents for Ashby and Herbert, and as such agents passing them on to new holders. The Court, however, held that when a security came back into the possession of the person who created it and who is primarily liable to pay the debt it was given to secure, there is an almost irresistible presumption in favour of its extinguishment, there being no reason why a man should seek to keep alive his own debt on a security given for it, only valid as against himself. The appeal was therefore dismissed.

Note.—There was obvious hardship on the holders of the re-issued debentures, specially on those who took them without any transfer, and were therefore entitled to regard them as issued in the ordinary way. This inequity was further emphasised by the case of *In re* Russian Petroleum Liquid Fuel Co., Ltd., 1907, 2 Ch., 540. There debentures had been deposited by the company with a bank as security for large advances. These were subsequently paid off, but prior to such payment, a small further advance of £500 was made with a view to keeping the debentures alive. The debentures were never given back to the company by the bank. Held, however, on the authority of this case of *In re* Tasker and

Sons, Limited, that inasmuch as the whole amount for which the debentures had originally been deposited as security had been paid off, the debentures themselves were spent, notwithstanding they had not been handed back to the company and that they could not be re-charged with the £500 subsequently advanced or any further sum.

It was to remedy this state of affairs that sec. 104 was introduced into the Companies (Consolidation) Act, 1908, 8 Edw. VII, c. 69. That section, sub-sec. (1), provides that where either before or after the passing of the Act a company has redeemed any debentures previously issued, the company shall, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of some general obligation on the company so to do, have power and be deemed always to have had power to keep the debentures alive for the purposes of re-issue, and that where a company has purported to exercise such a power the company shall have power and shall be deemed always to have had power to re-issue the debentures, either by re-issuing the same debentures or by issuing others in their place, and upon such a re-issue the person entitled to the debentures shall have and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

Sub-sec. (3) enacts that where a company has either before or after the passing of the Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited. Cases of definite advances like *In re* Russian Petroleum Liquid Fuel Co., Limited, are probably covered by sub-sec. (1) and this sub-sec. (3) seems designed to meet the case of debentures deposited as a continuing security for repeated advances by way of overdraft on current account or as a loan account, precluding the contention that the debentures were spent if at any time the account became in credit on balance.

Sub-sec. (4) provides that the re-issue of a debenture or the issue of another in its place by virtue of the section shall be treated as the issue of a new debenture for stamp purposes, but not for the purposes of any provision limiting the amount or number of debentures to be issued. Sub-sec. (5) preserves the operation as between parties, of any judgment given before March 7th, 1907, and directs that any appeal from any such judgment shall be heard and decided as if the Act had not been passed.

[IN THE COURT OF APPEAL.]

In re HAMILTON, YOUNG AND CO.—*ex parte* CARTER.

1905. Reported. [1905] 2 K.B. 772. Journal, Vol. XXVI, p. 504.

Bankruptcy—Bank Loan to purchase Goods—Letter of Lien—Construction.

THIS was an appeal from the decision of Mr. Justice Bigham, sitting in bankruptcy, reported, 1905, 2 K.B., 381, on a special case stated by the Judge of the County Court at Manchester under sec. 97 of the Bankruptcy Act, 1883, for the opinion of the High Court. The case raised a question of commercial law of some importance, in these circumstances.

The debtors, Hamilton, Young and Co., were adjudged bankrupts on August 15th, 1903, on their own petition, and a Mr. Carter was duly appointed the trustee in the bankruptcy. His title as trustee, however, related back to an act of bankruptcy committed by the debtors on the previous July 24th, which date was the date of the commencement of the bankruptcy; and the question was whether the National Bank of India, Limited (hereafter called the bank) were secured creditors with respect to certain goods by virtue of certain letters of lien given them by the debtors, or whether the trustee in bankruptcy was entitled to the goods by virtue of his title and rights under the Bankruptcy Act. The debtors were a mercantile firm at Manchester, and consisted of four partners. Two of the partners also traded in co-partnership at Calcutta under the style of Ewing and Co. The course of business between the two firms was as follows:—Ewing and Co. in Calcutta from time to time gave the debtors prices which they were willing to pay for any particular goods which they required to be delivered to them c.i.f. in Calcutta. If the debtors saw that they could ship the required goods at a profit on the stated prices their practice was to accept the offer of Ewing and Co. and to produce the goods by buying the grey cloth, causing it to be bleached and dyed (if dyeing was necessary), and then packed and shipped (carriage paid and insured) to Ewing and Co. at Calcutta. The difference between the price which Ewing and Co. had agreed to pay, and the cost to the debtors of production and delivery made up the gain of the debtors. If the prices offered by

Ewing and Co. were not high enough their orders were declined, and the debtors asked for better prices. The debtors were not bound to execute any orders given by Ewing and Co. For the purpose of obtaining, producing, and shipping as above mentioned, the debtors purchased in Manchester goods, and had them prepared, packed, and shipped to Calcutta. The course of preparation of the goods for shipment was that the goods when purchased were sent to be bleached to bleachers, where they remained to the order of the debtors, and such of them as from time to time were required by the debtors for shipment to Ewing and Co. were delivered by the bleachers, in accordance with directions given them from time to time by the debtors, either to the warehouse of the debtors or to packers to be packed. In order to obtain money with which to pay for the goods which they had purchased, the debtors from time to time used to obtain advances from the National Bank of India, Limited. The debtors had two accounts with the bank—a general account and a loan account—the latter account being called "loan account No. 2," and the course of business with the bank was as follows:—The debtors from time to time, as they required to pay for goods purchased in Manchester for shipment, drew cheques on the bank, which were honoured by the bank, and as security for the advances thereby made the debtors used to give the bank a letter of lien which (omitting formal parts) was in the following terms:—"We beg to advise having drawn a cheque on you for £——, which amount please place to the debit of our loan account No. 2, as a loan on the security of goods in course of preparation for shipment to the East. As security for this advance we hold on your account and under lien to you the undermentioned goods in the hands of [here followed list of goods and name of bleachers], as per their receipt enclosed. These goods when ready will be shipped to Calcutta, and the bills of lading duly endorsed will be handed to you, and we then undertake to repay the above advance either in cash or from the proceeds of our drafts on Messrs. Ewing and Co., Calcutta, to be negotiated by you and secured by the shipping documents representing the above-mentioned goods. But in no case is the advance to extend beyond two months from date hereof, unless by special arrangement, at the expiry of which we undertake to repay the same or any portion thereof then outstanding. Interest on this advance to be at the rate of 6 per cent. per annum. We undertake that the goods while in course of preparation for shipment shall be covered against fire risk under a general policy of assurance which we shall deposit with you." Accompanying the letter of lien the debtors gave to the bank the receipts of the bleachers for the goods specified in the letter. As soon as the debtors had in their hands ready for shipment to the East goods of a value at least equal to the amount of one of the cheques thus

drawn upon and honoured by the bank, they invoiced and shipped the goods to Ewing and Co. in Calcutta, and handed to the bank a copy of the invoice and the bill of lading of the goods so shipped, together with a letter signed by them (called the shipment letter) and a trust receipt to be signed by Ewing and Co. in Calcutta, and also a letter of written instructions to the bank as to the disposal of the moneys representing the value of such goods. The shipment letter was addressed by the debtors to the bank and (omitting formal parts) was as follows:—"Having this day received from you an advance of £——, bearing interest at 6 per cent. per annum, we hereby hand you as collateral security for the due repayment of such advance and interest, bills of lading, invoices, and policies of insurance for —— packages per —— to Calcutta, as described at the foot hereof, which documents are to be handed to your Calcutta agency. Our agreement is as follows:—Firstly, that on arrival of the documents in Calcutta they will be handed to Messrs. Ewing and Co. by your agents, who will receive in exchange a formal lien over them and the goods they represent, and an undertaking to provide for fire insurance. Secondly, that within six months after the date of the above advance, Messrs. Ewing and Co. will release the above documents referred to by delivering to your said agent a telegraphic transfer or demand draft on London for the equivalent amount of the said advance, together with interest at 6 per cent. per annum from date hereof, until approximate due date of arrival in London of such remittance. Your bank to have the preference at equal rates [then followed the particulars referred to]." The effect of each transaction above described was intended by the parties to be a payment in reduction of the outstanding amounts secured by goods hypothecated to the bank. When goods had been shipped of a value sufficient to cover or partly cover the amount outstanding under a particular letter or particular letters of lien, the amount mentioned in the shipping letters and documents was allocated to such particular letter or letters of lien either as a payment in full or in part of the amounts due under such letter or letters of lien, as the case might be. In cases where the amount was allocated as part payment of the amount due under a letter of lien it was the course of business that goods sufficient to secure both the undischarged balance and also the aggregate amount of all other letters of lien remained in the hands of the bleachers, or packers, or shippers, or in the warehouses of the debtors under lien to the bank. The goods shipped were on arrival delivered into a special godown rented by the bank, whose name appeared thereon and the keys whereof belonged to the bank and were in their possession. All such goods had been sold in Calcutta before arrival, and, under a verbal arrangement with Ewing and Co., in Calcutta, the bank allowed that firm to deliver such goods as

the bank's agents to the purchaser, Ewing and Co. paying into the bank on the day after delivery the amount of the invoice value of such goods. No drafts on Ewing and Co. were sent to the bank with the shipping documents or at all. The bank, after receipt of the letters of lien, had no information as to the movements of the goods between the bleachers, or the dyers, or the packers, and the debtors, nor as to whether the goods specified in the invoice and shipment letter and bill of lading corresponded wholly or partly with the goods specified in any letter of lien. All that the bank required was that the goods specified in the bill of lading, invoice, and shipment letters should be of a value sufficient to secure the bank in respect of the amount mentioned in the shipment letter. There was nothing in the shipping documents enabling the bank to identify the goods therein mentioned and the goods mentioned in the bleachers' receipts which accompanied the letters of lien. In June and early in July, 1903, the debtors had given the bank letters of lien on goods belonging to them which had been placed with bleachers and dyers as security for advances made to them by the bank amounting to £5,099 16s. 7d., and the bleachers' receipts had been sent with the letters of lien to the bank. On July 13th there were goods to a large amount in the hands of the bleachers and dyers, and also in the warehouses of the debtors. On July 14th the bank, hearing that Ewing and Co. were in difficulties, gave the bleachers and dyers notice claiming the goods in their hands, and on the same day they also gave notice to the debtors that they claimed the goods. On July 28th the debtors executed to a trustee a deed of assignment for the benefit of their creditors, and on August 15th they were adjudged bankrupt. On July 24th, the date of the act of bankruptcy, certain goods were at the bleachers and dyers, and the bank subsequently obtained possession of certain of the said goods claimed by the bank and caused them to be sold. Three questions were submitted by the special case, but they were really incorporated in the question whether or not the bank were, by virtue of their letters of lien, secured creditors in respect of the goods referred to in their letters of July 14th. The question turned mainly on sec. 4 of the Bills of Sale Act, 1878, which enacts that "the expression 'bill of sale' shall include assignments, transfers, declarations of trust without transfer, inventories of goods with receipts attached thereto, or receipts for purchase-money of goods, and other assurances of personal chattels . . . authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred; but shall not include the following documents . . . transfers of goods in the ordinary

course of business of any trade or calling, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of such document to transfer or receive goods thereby represented." On the part of the trustee in bankruptcy it was contended—(1) That the letters of lien were bills of sale, and, not being in the form and registered as prescribed by the Bills of Sale Acts, were void; and (2) that the goods at the commencement of the bankruptcy were in the order and disposition of the debtors as the reputed owners thereof. On the part of the bank it was contended—(1) That the letters of lien fell within the exception in sec. 4 of the Bills of Sale Act, 1878, as being "documents used in the ordinary course of business as proof of the possession or control of goods," etc.; and (2) that the letters of July 14th took the goods out of the order and disposition of the debtors. Mr. Justice Bigham, in a considered judgment, said that the letters of lien evidenced a transaction of a most ordinary kind as between bankers and merchants, happening by the score every day. It seemed to be the clear intention of the parties that the goods were held by the bleachers for the bank. The bleachers knew well that in the course of business they would be bound to hand the goods to the bank if required to do so. The documents were therefore such as were accompanied by a transfer of possession of the goods. Thus they came within the exceptions mentioned in sec. 4 of the Bills of Sale Act, 1878, as being "transfers of goods in the ordinary course of business of any trade or calling," or as being documents "used in the ordinary course of business as proof of the possession or control of goods." As to the other point—that the goods were in the order and disposition of the bankrupts at the commencement of the bankruptcy—his Lordship said that the goods were no doubt the goods of the bank in the sense that they had a charge on them; but the bank never consented to the goods being in the order and disposition of the bankrupts in their trade or business, and certainly did not do so in such circumstances that the bankrupts became the reputed owners of the goods. His Lordship accordingly answered the questions in favour of the bank. From that decision the trustee appealed.

The Court dismissed the appeal with costs.

Vaughan Williams, L.J., in giving judgment, held as follows: The letters of lien with accompanying receipt were not bills of sale, because they came within the exception from sec. 4 of the Act of 1878, being documents "used in the ordinary course of business as proof of the possession or control of goods."

Clearly they were documents used in the ordinary course of business and they were used as a proof of the possession or control of the goods. They were records of a bargain creating a lien or charge in favour of the bank, and declaring that Hamilton, Young and Co. held the goods specified in the respective letters on account of the bank and under lien in the hands of the persons therein named. They were not the less intended as proof of control because the goods while held by Hamilton, Young and Co. or their bailees, the bleachers, packers and others were to be dealt with by Hamilton, Young and Co. at their discretion in preparation for shipment. The control of the bank continued all along. The bank could at any time have obtained an injunction against Hamilton, Young and Co. if they had tried to take the goods out of the control of the bank for any other purpose. The possession of Hamilton, Young and Co.'s bailees was substantially that of Hamilton, Young and Co.

The Lord Justice alluded to the Bills of Sale Acts, 1890 and 1891, stating his opinion that they were designed to extend the exemptions in the former Acts to instruments creating security on imported goods prior to their being re-shipped for export, and, while enlarging the definition of bill of sale to commensurately widen the scope of the exceptions. He rested his judgment on the ground that the documents were "proof of possession." He agreed that the goods were not in the order and disposition of the bankrupts at the commencement of the bankruptcy.

Lord Justice Stirling delivered judgment to the same effect.

Lord Justice Cozens-Hardy read the following judgment:—I agree that this appeal must be dismissed, and for the reasons assigned by Lord Justice Vaughan Williams. The general policy of the Bills of Sale Act was not to interfere with ordinary business transactions. In so far as they might be hit by the general words in the definition of "bill of sale," they are taken out by the express exception. I think the letters of lien, coupled with the deposit of the bleachers' receipt, was a document used in the ordinary course of business as proof of the control of goods within the meaning of sec. 4 of the Act of 1878. It enabled the bank to prevent the bankrupts by injunction from dealing with the goods in any manner inconsistent with the arrangement contemplated by the parties, an arrangement which would result in the handing over of bills of lading when the goods were ready for shipment to Calcutta. It thus gave the bank a "control" of the goods. This disposes of the first and second questions. As to the third question, I think the attornment of the bleachers gets rid of all difficulty.

Appeal dismissed.

BANK OF MONTREAL *v.* EXHIBIT AND TRADING COMPANY, LIMITED.

1906. Reported. 22 Times L.R. 722.

Promissory Note—Variation in Endorsement—Stamp—Alteration.

THE defendants, an English company, made a promissory note in England, payable ninety days after date to the order of the Goderich Organ Company, and the note was sent out to the Goderich Organ Company in Canada. The Goderich Organ Company was converted into a limited company and the word "limited" was, after the making of the note, inserted in the space after the name of the company, and the note was endorsed on behalf of the Goderich Organ Co., Ltd., to the plaintiffs. Upon the plaintiffs suing the defendants on the note the defendants set up two defences: (1) That the addition of the word "limited" was a material alteration of the note, which made it invalid; and (2) that the note ought to have been stamped, and, not being stamped, could not be sued upon.

Held, that the alteration, if material, was not "apparent" within sec. 64, sub-sec. (1) of the Bills of Exchange Act, 1882, but that the plaintiffs could not sue on the note because (1) the endorsement of the Goderich Organ Company, Limited, was not the endorsement of the Goderich Organ Co., the payees; and (2) "that the note ought to have been stamped in England by the makers before they parted with it."

Mr. Justice Phillimore, in giving judgment, said that he was inclined to take the view that the alteration of the note was not "apparent," and, therefore, the note was not vitiated on that ground in the hands of the plaintiffs, who were holders for value. He was not prepared to decide, nor was it now necessary to decide, whether the alteration was material or not. The effect of holding that the alteration was not apparent was to set up the note according to its original tenor; that was to set it up as if it was payable to the Goderich Organ Company. There had been a company of that name, but when the note in question reached Canada that company appeared to have been turned into a limited company and the note came into the hands of the Goderich Organ Company, Limited. The proper officer of that

company endorsed the note, and probably he was the person who added the word "limited" on the face of the note, but as to that he had no information. He could not take the Goderich Organ Company, Limited, as meaning necessarily the same thing as the Goderich Organ Company: they were two distinct legal entities. The endorsement, therefore, by the Goderich Organ Company, Limited, could not be regarded as an equivalent to an endorsement by the Goderich Organ Company. The endorsement, therefore, was not in order, without prejudice to a fresh action on a proper endorsement. There was, however, another and fatal objection to the note. It was not stamped. It was suggested that he should treat the document as issued out of the United Kingdom. He did not think he could so treat it in fact, but he would assume that he could. *Ex hypothesi* the place of issue was Canada, and the only effect of the proviso (*a*) in sub-sec. 1 of sec. 72 of the Bills of Exchange Act, 1882, was to exclude any objection being taken in this country on the ground that the note had not been stamped according to the laws of Canada. That left entirely untouched the question whether objection could be taken to the note under the laws of the United Kingdom. Sec. 72, therefore, did not cover the present case. He had to look at the provisions of the Stamp Act, 1891, and under those provisions a bill or note had to be stamped before it passed out of the hands, custody or power of the drawer. The note, therefore, should have been stamped. There must be judgment for the defendants, with costs.

Note.—As to addition of word "limited" to name of a company, *cf.* Penrose *v.* Martyr, E. B. and E., 499. With regard to the stamp, Phillimore, J., appears to be quoting from sec. 34 of the Stamp Act, 1891. That section refers only to adhesive stamps on bills payable on demand, sight or presentation, or, under the Revenue Act, 1909, on bills payable not more than three days after date or sight.

The really relevant section is sec. 38 of the Stamp Act, 1891, and the question would be whether the note was "issued" in the United Kingdom or in Canada.

Phillimore, J., held that, admitting the latter to be the case, sec. 72 (1) of the Bills of Exchange Act, 1882, was excluded and that the stamp objection held good. This seems doubtful.

Possibly, the note was issued by being posted in this country; though it might be contended, from Downes *v.* Richardson, 5 B and Ald., 674, that, for stamp purposes, a bill or note is only issued when it reaches the hands of a holder for value.

It is certainly difficult to see how a bill or note, drawn or made in England, but issued in Canada, could be properly stamped so as to be sued on here, unless it was stamped by the drawer or maker in the first instance.

ATTORNEY-GENERAL *v.* DE WINTON.

1906. Reported. [1906] 2 Ch. 106.

Urban Authority—Borrowing Powers exhausted—Further Overdraft at Bank—Illegal Payments.

An urban authority had exhausted its borrowing powers, and had, in addition, a large fluctuating overdraft at its bankers, the account being kept in the name of the defendant, who was their treasurer, and the bank authorised by resolution of the council to honour cheques drawn on the treasurer, whether the account was in credit or overdrawn.

Held by Farwell, J., on the authority of Smith *v.* Southampton Corporation, that the overdrafts were unlawful. That the borrowing powers of the borough were subject to statutory conditions, restrictions and prohibitions which could not be dispensed with.

Interest on the overdraft at 4½ per cent. had been debited by the treasurer to the borough and credited to himself.

Held that the treasurer was not entitled to do so, the payment of interest being as illegal as the overdraft, and on the further ground that the moneys received by the treasurer were trust moneys to his knowledge, and that according to the decision of Fry, J., in Foxton *v.* Manchester and Liverpool District Banking Co., 44 L.T., 406, "those who know that a fund is a trust fund cannot take possession of that fund for their own private benefit, except at the risk of being liable to refund it in the event of the trust being broken by the payment."

Note.—As to illegal borrowing by local authorities, compare Rex *v.* Locke, *post*, p. 267, and cases there cited.

[IN THE COURT OF APPEAL.]

In re BOURNE. BOURNE *v.* BOURNE.

1906. Reported. [1906] 2 Ch. 427.

Partnership Account—Surviving Partner—Pledge of Partnership Property.

From 1873 to 1894 W. T. Bourne and G. Grove carried on business in co-partnership, in the name of Bourne and Grove, under articles of partnership which provided that on the death of either partner during the partnership his executors or administrators should be entitled to the capital belonging to the deceased partner with 5 per cent. interest. In July, 1894, the partnership term expired, and thereafter the partners continued to carry on business in co-partnership on the terms of the articles so far as they were applicable to a partnership at will until the death of Grove on May 9th, 1901. After Grove's death Bourne carried on the business in the partnership name until his death on September 3rd, 1902. By an order made in an action to administer Bourne's estate, which was insolvent, it was ordered that Grove's executors should be at liberty to prove for £3,000, as representing his interest in the partnership assets, and their costs against Bourne's estate, and were to have a lien for the amount of such debt and costs on the assets of the partnership or the proceeds of sale thereof.

Messrs. Berwick and Co. were the bankers of the firm, and at Grove's death the partnership account at the bank was overdrawn to the amount of £6,476 odd. After Grove's death, Bourne continued the account at the bank in the firm's name, for the exclusive purposes of the business carried on by him. On February 7th, 1902, Bourne deposited with the bank the title deeds of certain real estate forming part of the partnership property, and signed a memorandum of deposit to secure the overdraft, which then stood at £5,088 odd. Between the date of Grove's death and the date of the memorandum of deposit Bourne had paid into the bank to the credit of the account £10,073 odd, and had drawn out £8,685 odd. After the memorandum of deposit further sums were paid in and drawn out, and at Bourne's death the overdraft stood at £4,463 odd. After

Bourne's death the business was sold by Order of the Court, and the property which was the subject of the equitable mortgage was represented by a sum of £5,300. The question was whether the bank or Grove's executors were entitled to priority.

Farwell, J., held that the bank took priority.

Grove's executors appealed.

The Court of Appeal dismissed the appeal.

Lord Justice Vaughan Williams:—This case turns upon a very narrow point. It is conceded by both the appellants' counsel that when there is a partnership between two partners and one of those two partners dies, unless there is something in the partnership articles to the contrary, *primâ facie* the surviving partner has not only the right, but the duty, to realise the partnership property, and for the purpose of that realisation to carry on the business if it is necessary so to do. That is not disputed, but it is said that, although that is perfectly true with regard to so much of the partnership assets as constitute personal property, it is not true in respect of real property. Now, I say in the first instance that no case has been produced to us which decides anything of the sort; no case has been produced to us which excludes from this power of the surviving partner the right to realise and deal with partnership realty for the purpose of paying partnership liabilities. In the next place, I say that, so far as the principle is concerned, it is obvious that the principle is wide enough to cover both personalty and realty. The real truth of the matter is that, leaving out all questions of legal estate, there is, as between the surviving partner and the representatives of the deceased partner, an over-riding duty to wind up the partnership assets and to do such acts as are necessary for that purpose, and if it is necessary for that winding-up either to continue the business or borrow money or to sell assets, whether those assets are real or personal, the right and the duty are co-extensive. I will go one step further. It really appears from the case of *In re* Clough,* to which our attention was called, that it is not denied, and cannot be in the face of the authorities, that, given a debt which was in existence before the dissolution by death, there is the right to sell or pledge the realty. It is not merely suggested here that the rule does not apply to realty; but it is said that that is a limited rule, and that the surviving partner, although he has the right to raise money on the mortgage of the realty, can only do it for the purpose of particular debts. I say again that I cannot find any authority for that proposition . . . . . Under these circumstances I think that this part of the argument fails. Then it is said that by the applica-

* (1885). 31 Ch.D., 324.

tion of the principles which are the basis of the rule in Clayton's case this debt must be taken to have been paid, and therefore the bankers cannot rely upon this mortgage, because they ought to have known that that debt having been paid, the surviving partner had no right to pledge or mortgage the real estate. All I can say with reference to that is that as far as the bankers are concerned this apparently was an ordinary winding-up; there were payments in and payments out; and both the payments in and the payments out must be taken to have been made on account of this realisation and winding-up. Under these circumstances it seems to me that point also fails. I think, therefore, that the appeal fails, and must be dismissed with costs.

Lord Justice Romer:—I am of the same opinion. When a partner dies and the partnership comes to an end, it is not only the right, but the duty, of the surviving partner to realise the assets for the purpose of winding up the partnership affairs, including the payment of the partnership debts. It is true that in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of his interest in the partnership on taking the partnership account, but that lien is not one which affects each particular piece of property belonging to the partnership so as to affect that property, in the hands of any person dealing with the surviving partner in good faith. It is really what one may call a general lien upon the surplus assets, and does not affect each particular property so as to interfere with the right of the surviving partner to deal with the separate properties belonging to the partnership for the purpose of realisation and to give a good title to persons dealing in good faith with him in respect of those properties. The power of the surviving partner, of course, extends to a sale, and it also extends to giving a mortgage on any particular part of the property belonging to the partnership to secure in good faith one of the partnership debts . . . . . Then the only question remaining is this: Was the debt of the bank which the surviving partner gave the charge to secure one that really to the knowledge of the bank was not a partnership debt? To my mind, on the contrary, the bank were entitled to consider it and treat it as a partnership debt. The account with them was a partnership account. It was continued under the partnership name, and apparently for the purposes of the partnership, and it appears to me impossible to say that it is not or may not be reasonable for a surviving partner to continue the partnership account for the purpose of winding up the estate. To my mind the case is very much as if the only change in the account had been to put the account of the partnership in administration. When you find an account of that kind continued—and here it is only continued for something like nine

months before the charge is given—the bankers, it appears to me, are entitled, in the absence of anything showing the contrary, to assume and to be credited with the belief that the surviving partner is continuing it for the purpose of realisation, and that sums paid into that account in the name of the partnership are paid in and drawn out for the purpose of the partnership. That being so, in this case when the account is finally taken and there is a balance due to the bankers, that, to my mind, is a balance which the bankers are entitled to believe and to assert was, so far as they were concerned, a partnership debt in respect of which they were entitled to have the security given which this surviving partner gave. It appears to me that under these circumstances from any point of view the charge given was one which it was within the powers of the surviving partner to give, and that accordingly the bankers have a right in respect of that charge which is superior to any claim by the executors of the deceased partner in respect of their lien.

Lord Justice Fletcher Moulton agreed.

Appeal dismissed.

Note.—Compare sec. 38 of the Partnership Act, 1890, which gives surviving partners power to bind the firm, so far as is necessary to wind up the affairs of the partnership.

[IN THE PRIVY COUNCIL.]

THE COLONIAL BANK OF AUSTRALASIA, LIMITED, *v.* MARSHALL AND ANOTHER.

1906. Reported. [1906] A.C. 559. Journal, Vol. XXVII, p. 357.

Forgery—Alteration of Amount of Cheque facilitated by blanks left when signed—Bank held not entitled to debit Customer with increase in amount.

This was an appeal from a judgment of the High Court of Australia of October 27th, 1904, reversing a decision of the Supreme Court of Victoria and a judgment of Chief Justice Madden.

The facts are stated in the judgment, which is quoted in full, owing to the importance of its bearing on bankers.

The arguments were heard before a Board composed of the Earl of Halsbury, Lord Macnaghten, Sir Arthur Wilson, and Sir Alfred Wills.

Sir Arthur Wilson, in delivering the Judgment of the Board, said the two respondents, Marshall and Day, and one Myers were executors of Ann Myers. As such they opened an account with the appellant company in Melbourne on March 24th, 1900, when they paid in £1,596 15s. 2d. Against that account cheques were from time to time drawn, signed by the three executors. On May 25th, before any of such cheques were drawn, the three executors addressed a letter to the bank, requesting it to pay cheques signed by the three and sent specimens of their signatures. Myers, who alone resided at Melbourne, drew each of the cheques, sent it for signature to Marshall, who signed first, then to Day, who signed second, and finally added his own signature. The present controversy related to five cheques, which, as originally drawn by Myers, and signed by Marshall and Day, were for £10, £2 6s. 4d., £50, £10, and £10. But each of those cheques was so written out as to leave a space between the left-hand margin and the statement of the amount of the cheque, both as given in words and as given in figures, and in that condition it was signed by Marshall and Day. Myers, by acts amounting to simple forgery, added words and figures to the left of those originally written in the cheques, so turning them apparently into cheques for £110, £32 6s. 4d., £150, £110, and £110. The

cheques in their altered forms were presented to and paid by the bank. And it had been found (and their Lordships accepted the finding) that the bank could not, by the exercise of ordinary care and caution, have avoided paying the cheques as altered. When the forgeries came to light, the bank claimed to debit the executors' account with the amounts of the cheques as paid by it in their altered form; whilst the respondents contended that the debit should only be of the original amounts of the cheques. The aggregate of the differences was £450. The suit was then brought in the Supreme Court by the respondents against the bank. The defence raised the whole question now material in a paragraph which said:—"If the said cheques or any of them were fraudulently altered and increased in amount, such cheques were, and each of them was, drawn by the plaintiffs and the defendant Myers without reasonable care or precaution, and in a manner and form so negligent that they enabled and permitted the alterations and erasures, if any." And it was contended that the plaintiffs were "estopped from alleging that the cheques so altered and increased in amount were not their cheques or drawn by them or with their authority and from alleging that the cheques, or any of them, were, in fact, fraudulently altered and increased in amount." The case was tried before Chief Justice Madden and a jury. The Chief Justice left to the jury the question, "Were the cheques, or any of them, drawn by the plaintiffs negligently, having regard to what I have told you?" And he proceeded to say, "if a customer of a bank is drawing a cheque upon that bank, it appears, according to our law (as I think it still exists), that the customer is bound to avoid such negligence in drawing out his cheque as will unreasonably expose the banker to the risk of having to pay more than the proper amount of the cheque which was drawn out by such a customer." The Chief Justice afterwards expressed his view a little more fully by saying, "If you draw a cheque in a manner which a jury thinks is so negligent that it induced or caused opportunity to a person who chances to be desirous of committing a forgery to effect that forgery, so that the banker is exposed to the paying of a larger sum than you—the customer—intended when you signed the cheque, then the law is that if a jury is of opinion that such action of the customer amounts to negligence, and negligence of such a kind as, in the opinion of the jury, ought to preclude him from complaining of the fact that the banker paid the altered cheque, then the customer cannot complain against the bank." The jury answered the question in the affirmative and found a verdict for the bank. The full Court, on appeal, approved the ruling of the Chief Justice and affirmed the judgment. The High Court of Australia reversed that decision, holding that the Chief Justice's ruling was not in accordance

with law and that there was no evidence of negligence proper to be left to the jury. Against that decision of the High Court the present appeal had been brought. In the course of the argument before their Lordships, as well as in the Courts in Australia, much was said about the case of Young *v.* Grote, 4 Bing., 253. That case, however, was critically examined in the House of Lords in Scholfield *v.* Earl of Londesborough, 1896, A.C., 514, and the latter had now become the governing authority which must prevail so far as the principles laid down in it extended. In order to appreciate the effect of that decision, it is necessary to notice the history of the case and the manner in which it came before the House of Lords. The suit was by a holder for value of a bill of exchange against the acceptor, in which the plaintiff sought to make the defendant liable for the full apparent amount of a bill accepted by him, and subsequently increased in apparent amount by a forger on the ground that the bill, as accepted by the defendant, was drawn in a manner so negligent as to have facilitated the forgery subsequently committed. The case was tried before Mr. Justice Charles, without a jury, and the learned Judge had to deal, and dealt, with two principal propositions essential to the plaintiff's success. The first was that the law merchant imposed upon everyone who accepted a bill of exchange with a view to its circulation the duty of taking reasonable precautions in order to prevent the possibility of its amount being fraudulently increased. That proposition the Judge accepted. The second proposition was that, on the facts, the acceptor of the bill had been guilty of such negligence as to bring him within the operation of the first proposition. That proposition was rejected by the Judge, who dismissed the suit. There was no suggested ground of negligence in the present case which was not present in Scholfield *v.* the Earl of Londesborough. In the Court of Appeal two of the Lords Justices rejected both propositions, holding not only that no such duty as alleged lay upon the acceptor of a bill, but also that, assuming the existence of such a duty, it had not been violated. The third Lord Justice accepted both propositions as correct, and thought the plaintiff ought to succeed. The first proposition was expressly negatived by the House of Lords, but so far the decision did not directly affect the present case, for the contractual relation existing between a banker and his customer differentiated their case from that of the acceptor and the holder of a bill, and that was pointed out by several of their Lordships. It was recognised that there was or might be a duty on the part of the drawer of a cheque towards his banker which did not exist on the part of the acceptor of a bill towards the holder. It was recognised that "if the customer by any act of his has induced the banker to act upon the document by his act, or neglect of some act usual in the course of dealing between them,

it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled." No attempt was made to define the extent of such obligation; it was unnecessary to do so in that case, nor did their Lordships propose now to attempt any abstract definition of such duty. Indeed, it would be impossible to do so, seeing that the extent of the duty might depend upon an agreed or established course of dealing between the parties. But the duty which, according to the ruling of the Chief Justice, subsisted between customer and banker was substantially the same as that contended for in Scholfield *v.* Earl of Londesborough as existing between the acceptor and the holder of a bill. And the House of Lords had before them the question whether the Court of Appeal was right in ruling that the facts found in that case (which included everything existing in the present) did not amount to a breach of the obligation, supposing that obligation to exist. Not one of the members of their Lordships' House appeared to have expressed the slightest disapproval of that ruling, and most of their Lordships distinctly approved of it. The Lord Chancellor expressed his concurrence in the opinion of Lord Justice Lindley, "that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of Chief Justice Bovill, in a former case, Société Générale *v.* Metropolitan Bank,* that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing a forgery, but the law of the land." Lord Watson approved the same rulings. Lord Macnaghten expressed the same opinion, and Lord Davey concurred in the judgment of Lord Watson. The principles there laid down appear to their Lordships to warrant the proposition that, whatever the duty of a customer towards his banker might be with reference to the drawing of cheques, the mere fact that the cheque was drawn with spaces such that a forger could utilise them for the purpose of forgery was not by itself any violation of that obligation. Their Lordships therefore agreed with the High Court of Australia in holding that there was no evidence proper to be left to the jury of negligence on the part of the respondents. They would humbly advise His Majesty that this appeal should be dismissed. The appellants would pay the respondents' costs of and incidental to the appeal as between solicitor and client.

Note.—One thing to be said about this case is that being only a decision of the Privy Council it has no binding effect on any regular Court. Moreover, the Privy Council is not bound by its own decisions, and can re-open any proposition of law laid down by

* (1873) 27 L.T. (N.S.) 849.

them if fresh argument be adduced in a subsequent case. It should, however, be noticed that two of the members of the Board who heard this case, Lords Halsbury and Macnaghten, were parties to and delivered judgments in Scholfield *v.* Londesborough, the House of Lords case which is vouched as an authority for the present decision, and on any future occasion it would be difficult to counteract the suggestion that this case involved an inspired exposition of the *ratio decidendi* of Scholfield *v.* Londesborough. Apart from such guidance, that case might well lead, indeed, had led, the ordinary mind to the opposite conclusion, since the judgments contain careful differentiation of the position of the acceptor of a bill and that of the drawer of a cheque, and lay stress on the absence of any duty on the part of such acceptor towards the intermediate future holder such as they admit to exist from mandant to mandatory, customer to banker. The judgment of the Privy Council absolutely ignores the numerous cases, some of them House of Lords decisions, in which the authority of Young *v.* Grote, within its due limitations, namely, as applying only between banker and customer, has been vindicated. The case aroused much adverse comment, and it is difficult to see what room it leaves for the operation of the duty of customer to banker in relation to drawing cheques, if it does not extend to circumstances such as these. It may be noticed that the decision is of general application, no point being made of the particular relations of the several drawers, or the fact that the altered cheques were actually issued in that condition by one of the executor drawers. The effect of this case is aggravated by the practical elimination of the pass-book as a protection to the banker, which seems the probable result of recent decisions. See Kepitigalla Rubber Estates, Limited, *v.* National Bank of India, Limited, 1909, 2 K.B., 1910, *post*, p. 186.

[IN THE COURT OF APPEAL.]

FROST *v.* LONDON JOINT STOCK BANK LIMITED.

1906. Reported. 22 Times L.R. 760. Journal, Vol. XXVII, p. 361.

Libel—Answer on Slip with returned Cheque.

THIS was an application by the defendants for judgment or a new trial in an action for libel tried before Mr. Justice Lawrance and a special jury, in which the plaintiff had recovered £50 damages. It is reported in Journal, Vol. XXVII, p. 237. The facts were as follows: —The plaintiff was a tradesman who carried on business in the North of London and had an account at the National Bank. He had been for some time having dealings with Messrs. Bartlett, who appeared to be a firm in a large way of business, and there was an account running between them. On April 1st, 1905, the plaintiff, in the usual course of business, drew a cheque on his account at the National Bank for £60 3s. 6d., in favour of Messrs. Bartlett, and he handed it to them on April 28th. Messrs. Bartlett, who had their banking account at the defendant bank, sent the cheque to the defendants for collection. On the next day but one the cheque came back to Messrs. Bartlett by a messenger from the defendant bank, and attached to it was a slip, on which the action was brought. The slip bore words partly printed and partly written. At the top was printed "London Joint Stock Bank," and underneath were printed the words "Reason assigned," and against these words were written the words "Not stated." The cheque and the slip were brought back together and were handed by the messenger to the only person who appeared to be in a position to receive them in Messrs. Bartlett's office —viz., their cashier. The cashier jumped to the conclusion that there was something wrong with the credit of the plaintiff, the drawer, and he communicated his suspicion to one of the partners of the firm. The result was that business dealings between the firm and the plaintiff were delayed for a day or two. Communications passed, and it was found that a mistake had been made, that the plaintiff's cheque was a perfectly good cheque, and that he had ample assets at his bank. The difficulty was thus got over, but the plaintiff conceived that he had been injured in his credit. The way in which the mistake arose was this. The

defendant bank, acting as a collecting bank, ought, in the ordinary course, to have forwarded cheques paid in to them for collection to the banks on which they were drawn. By some blunder the cheque drawn by the plaintiff never found its way to the bank on which it was drawn, but remained where it was in the custody of the defendant bank. A clerk of the defendants', finding it two days later, presumed that it had been presented and returned, and he thereupon filled up the slip which was the foundation of the action. The cheque never having found its way to the National Bank, it was clear, the Master of the Rolls said, that there was negligence somewhere. This, however, as he pointed out, was not an action of negligence; in fact, there was no relation of contract or privity between the plaintiff and the defendants such as would be necessary to sustain an action for breach of contract or breach of duty. The plaintiff's only cause of action, if he had any, was that for libel which he had put in suit. The question was whether he had established that cause of action. At the trial evidence had been called with a view to showing that business men would interpret the slip as meaning that the cheque had been dishonoured for want of funds to meet it, and stress was laid by counsel for the plaintiff on the fact that where a cheque is not paid on the ground of irregularity, such as absence of date or non-correspondence of endorsement with payee's name, the bank on which it is drawn invariably return the cheque to the presenting bank for rectification or explanation.

The Court of Appeal held this did not go far enough, as the absence of any statement of the reason for the cheque being returned could not rightly give rise to a presumption of one interpretation rather than another, especially when the suggested construction was the injurious one. They therefore allowed the appeal and ordered judgment to be entered for the defendant bank.

The reasons for the judgment in favour of the bank, given by the Master of the Rolls, may be summarised as follows:—

Though the slip attached to the cheque and returned with it was capable of being interpreted and understood in a libellous sense, yet, in order to found such libellous interpretation there must be evidence, outside the document itself, that it was calculated to lead reasonable people to attach an injurious meaning to it, and in the present case there was no such evidence. The Master of the Rolls referred to Capital and Counties Bank *v.* Henty, 7 A.C., 741, in which the House of Lords held that a circular letter which stated that cheques on a particular bank would not be taken, was not in itself libellous. No doubt some people might guess that the refusal imputed some doubt as to the credit of the bank, but, as Lord Blackburn said, quoting Brett,

L.J., "It is unreasonable that where there are a number of good interpretations, the only bad one should be seized on to give a defamatory sense to the document. An inference drawn by the reader from a fact notified in a document does not in itself constitute a libel." In the same case Lord Wilson laid it down that the true test was whether an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of every person of average intelligence on reading the circular. Much to the same effect is the case of Nevill *v.* Fine Art Insurance Co., 1897, A.C., 68, cited in the Court below, but not referred to in the judgment under review. There the alleged libel consisted in an advertisement stating that the plaintiff was no longer an agent of the society, and the House of Lords held that this in itself could not be treated as libellous.

Of course, as Lord Blackburn said in Capital and Counties Bank *v.* Henty, "a statement might be published in such a way and to such persons as to show that its natural tendency would be to convey an impression that the person refusing to take the cheques on that bank did doubt its credit, and then it would be libellous," and the same principle applies to all cases of documents innocent in themselves. But the Court of Appeal found no such outside conditions in the present case. The Master of the Rolls said: "The plaintiff's counsel relied on the fact that Messrs. Bartlett's cashier interpreted the slip in an injurious sense and on the evidence of expert witnesses that the absence of reasons for returning the cheque was equivalent to a statement that the reason was that the plaintiff had no assets. But this comes far short of what was requisite. There was no evidence that the cashier was a reasonable person, on the contrary, he seems to have acted unreasonably and precipitately. And the absence of reasons for returning the cheque could not rightly give rise to a presumption in favour of one interpretation of the slip more than another." He was therefore of opinion that the plaintiff had failed to discharge the onus which lay upon him and that the verdict and judgment must be set aside and judgment entered for the defendant bank.

The other Lords Justices delivered judgment to the same effect.

Judgment accordingly.

Note.—Although this action happened to be brought against the collecting, not the paying, bank, the principles enunciated are, of course, equally applicable to answers given on or with respect to a cheque by the banker to whom it is presented and who refuses payment—although the action against him usually assumes another form—and the question of negligence might come into play, the relation of banker and customer giving rise to a duty which was not predicable in Frost's case. It may well be that

some of the answers in daily use have acquired specific meanings to business men, but it is deducible from this case that such mere technical construction is not sufficient to put a forced or malignant interpretation on words not in themselves defamatory.

A broader view seems to have obtained in recent libel cases as to the amount of evidence required to identify the plaintiff with a person indirectly and even unintentionally affected by a defamatory statement. The rules above laid down, being directly deduced from House of Lords cases, cannot be taken to have been affected thereby, and the distinction, if any, must be between the subject matter of the alleged libel, and its application to a particular person.

[IN THE COURT OF APPEAL.]

PONSFORD, BAKER AND CO. *v.* UNION OF LONDON AND SMITHS BANK, LIMITED.

1906. Reported. [1906] 2 Ch. 444. Journal, Vol. XXVII, p. 366.

Act of Bankruptcy—Redemption of Securities.

This was an appeal from a decision of Mr. Justice Buckley's reported in 22 The Times Law Reports, 581, which raised a question of great importance to bankers and others who advance money on the deposit of securities, the point being as to the rights and liabilities of a pledgee of chattel securities to whom the pledgor, known to have committed an act of bankruptcy, tenders the amount due, demanding back the security. The facts were, shortly, as follows:—The plaintiffs, Messrs. Ponsford, Baker and Co., stockbrokers, deposited securities with the defendant bank to secure a loan of £10,500. On April 27th, 1906, the firm were declared defaulters on the Stock Exchange, and made an assignment of all their assets to the official assignee of the Stock Exchange, thereby committing an act of bankruptcy. It thereupon became the duty of such official assignee to collect the assets of the firm. At this date the bank had standing to the credit of Messrs. Ponsford, Baker and Co. on current account about £1,000. On May 15th, Messrs. Ponsford, Baker and Co. and the official assignee of the Stock Exchange tendered to the bank the amount due with interest, and called upon the bank to deliver up the securities, which were worth more than the loan; the bank refused to do so on the ground that as the official assignee was assignee of all the property of the firm, an act of bankruptcy had been probably committed within three months, of which the bank had notice, and that under the circumstances, and having regard to sec. 49 of the Bankruptcy Act, 1883, the bank could not safely hand over the property until the three months had expired without bankruptcy proceedings being commenced against the firm; the bank also contended that if bankruptcy proceedings were commenced there would be relation back to the date of the act of the bankruptcy, so as to defeat interim dealings by a person having notice of that act, and that such a person would not be protected by sec. 49. Messrs. Ponsford, Baker and Co. and the

official assignee thereupon commenced the present action against the bank and moved before Mr. Justice Buckley, on May 25th last, for an order that upon payment into Court or to the bank of the amount due and interest, the defendants might be ordered to deliver up the securities to the plaintiffs, or that the securities might be ordered to be sold forthwith. Mr. Justice Buckley, considering that the case was exactly covered by the decision in *In re* Lawford and Lawrence, 1902, 2 K.B., 445, made an order that upon payment to the bank of the amount agreed to be due on the securities, after giving credit for the amount due on the plaintiff firm's current account, the securities should be delivered to the plaintiffs. The motion would be treated as the trial of the action and the bank must pay the costs. The bank appealed.

The Court allowed the appeal. The judgment of the Court was delivered by Lord Justice Fletcher Moulton.

The Court admitted the importance and difficulty of the questions raised, which involved consideration in most general form of the effects of the relation back of the title of a trustee in bankruptcy, under sec. 43 of the Bankruptcy Act, 1883, to the earliest act of bankruptcy committed within a period of three months prior to the presentation of the petition on which the adjudication was founded. It was contended that such relation back only affected voluntary dispositions of property, not those sanctioned by or the result of legal proceedings taken by the bankrupt, since the judgment or order of a competent Court operated as an effectual discharge and protection to the creditor. Many cases were cited in which the commission of an act of bankruptcy had been held to constitute no defence to an action by the person who had committed such act. The difficulty confronting the Court was this. A man who has committed an act of bankruptcy has no power to deal with his estate or give a good discharge in respect of any part of it. His title as beneficial owner is not absolute, but is contingent on no bankruptcy petition being presented within three months after the act of bankruptcy on which the receiving order is founded. If such order be made, the whole of the assets vest in the trustee in bankruptcy as from the date of the act of bankruptcy. At the same time, it may be in the interest of the estate that the obligations of its debtors should be enforced at once. There is no one who can enforce them other than the possible prospective bankrupt. The three months is not a moratorium in favour of debtors. Courts have held that this is so and that known commission of an act of bankruptcy by the plaintiff affords no ground of defence. But it does not follow that the money is to be paid to him. The earlier cases in which his unqualified and absolute right to recover was recognised were decided when the relation back of the trustee's title, if bankruptcy supervened, extended over an indefinite period,

and it was not reasonable that a Court should keep the proceeds of a judgment in suspense on the chance of possible bankruptcy at an indeterminable future date. Now, the longest practical period of suspense was three months, and the Judicature Acts conferred on the Courts, Common Law and Equity alike, large discretionary powers. The person committing the act of bankruptcy was clearly not the proper person to collect his estate. That is shown by his incapacity to give a personal discharge, and by the invalidation of voluntary payments to him with notice of an available act of bankruptcy. No doubt the judgment or order of a competent Court would be a discharge to the debtor, but the rights of creditors would be imperilled if bankruptcy was impending and occurred within the three months, and the very fact of its judgment operating as a discharge should make a Court astute to prevent its process being used as a means of defeating the clear purpose of the Bankruptcy laws. They had ample jurisdiction for so doing. The right course for the Court to adopt was to direct the money recovered to be paid into Court until it could be seen whether the person who is entitled to it is the plaintiff or the representative of his estate, a question which would always be solved within three months, in practice, considerably less.

The Court, however, recognised that the case of securities deposited to cover a liability of smaller amount, such as the present one, presented greater difficulty. The intervention of the official assignee could not affect the situation, his title rested on the assignment to him which was in itself an act of bankruptcy, and could be no better than that of the assignor. They dealt with the case as if the demand and tender had been by Ponsford, Baker and Co. alone.

They state the question thus: "Has a person who has committed an act of bankruptcy the right to require a secured creditor who has notice of it to give up his securities on payment of the amount due, and can he, in case of refusal, enforce that right by action?"

Reference had been made to sec. 9, sub-sec. 2, of the Bankruptcy Act, 1883, which preserves the absolute right of a secured creditor to realise or deal with his security. The Court pointed out that this had no bearing on the question before them. It enables the creditor to deal with his security, but it does not afford anyone else ground for compelling him to do so. And though the decision was not necessary, they expressed, by way of warning, the very strongest opinion that the sub-section would not justify the secured creditor, having notice of the act of bankruptcy, in handing over the security to and receiving payment from the person who had deposited it and who had committed the act of bankruptcy. The invalidity of such a transaction would arise,

not from any deficiency of power in the creditor to deal with the security, but from the fact that the person who proposed to pay the money was personally incapacitated from making any such payment or from receiving the securities in return for the same. This was no real limitation of or encroachment on the creditor's power to deal with the securities. It was only a consequence of his debtor's having incapacitated himself from tendering the money. Buckley, J., in the Court below, had considered himself bound by the decision of Wright, J., in *In re* Lawford and Lawrence, 1902, 2 K.B., 445, to the effect that a pledgee of goods remained subject to the duty to re-deliver the goods to the pledgor on receipt of the money due, and had a right to discharge himself of that liability under the contract, even though the pledgor had to his knowledge committed an act of bankruptcy prior to the tender of the money. That judgment the Court conceived to have been based on a mistaken distinction between the operation of relation back with reference to money and to goods. Sec. 43 relates to the property of the bankrupt without discriminating between money and goods, while sec. 49 speaks of "payment or delivery to the bankrupt;" "payment" obviously referring to money, "delivery" to goods. There was no reason in the nature of things why the Bankruptcy Act should import any such distinction.

The Court held that in such case the pledgor had disqualified himself from making a tender to the pledgee, and that therefore it was not open to the latter to accept the money. And, following this up, the Court decided on general principle what they had already implied with regard to sec. 9, sub-sec. (2) of the Bankruptcy Act, saying, "We are of opinion, therefore, that a secured creditor is not entitled to receive payment of the debt from his debtor after notice of an act of bankruptcy."

Of course, it follows that the debtor cannot by such tender oblige the creditor to give him up the security. But the Court recognised that the mere fact of an act of bankruptcy having been committed no more constitutes ground of defence in an action for redemption than it does in an action for debt, and that the pledgor should be allowed to exercise his right of suit, subject to the necessary supervision of the Court with regard to the proceeds. They appreciated the difficulty and complexity arising where securities are concerned, and indicated the course which might presumably be followed in future cases, and that to be adopted in the present one, as follows: "In the first place, it is clear that the Court must do nothing to prevent the creditor from dealing with the securities in any way in which he is entitled to deal with them by virtue of his contract with the debtor so as to repay himself the money due to him. Nor can the Court require the creditor to surrender the securities without authorizing the

payment to him of the amount due thereon. But, even with these restrictions, the aid of the Court may, with advantage, be invoked in many cases. Whereas in the present case there is an assignee who is not incapacitated from making payments, the Court might direct the defendant to deliver up the securities on payment by the assignee of the amount due, such securities to be held by him until it is decided whether bankruptcy will ensue or not. In such a case, inasmuch as the Court would act upon equitable principles, the assignee would, in case of bankruptcy supervening, be relegated to the position of the secured creditor, and the trustee in bankruptcy could only obtain the securities by repayment of the sum paid by the assignee to obtain their delivery over to him. And even in certain cases where the action was brought by the bankrupt alone, the Court might sanction the payment by the bankrupt himself in order to save the estate from suffering disproportionate injury on principles analogous to the cases in which the Court has held that payments to save forfeiture were good against the trustee in a subsequent bankruptcy where the estate has benefited by the forfeiture having been thus averted. But we apprehend that, in cases where it was not clearly to the interest of the estate that the securities should be redeemed, the Court would hold its hand and would not permit the debtor's estate to be used in this way until it was clear whether or not the debtor or his trustee in bankruptcy were the party entitled to redeem. A creditor is a secured creditor, whether or not the securities are adequate to protect him from loss, and the Court would, I think, be averse to authorize an election by the debtor to redeem the securities when it might well happen that his trustee in bankruptcy might prefer not to do so. In the present case, the learned Judge has, by his judgment, treated the defendants as having wrongfully refused to allow the debtor or his assignee to redeem. For the reasons above given, we are of opinion that this judgment was wrong and should be set aside. If the assignee is prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings are taken, or the period of three months has expired, we are of opinion that we ought to make an order empowering him so to do. But, if he is not, we do not think that we ought to give any immediate judgment in this action, but ought to direct it to stand over until it can be seen who is the person entitled to redeem. There is no such clear balance of advantage shown by the evidence as would, in our opinion, justify us in treating this as a case in which a payment should be made of the nature of salvage. But, whatever be the order in these respects, the defendants are entitled to their costs of action, as well as to interest on the amount due until actual repayment, and they are entitled until repayment to exercise any rights they may possess enabling them to realize the

securities. They are in the position of secured creditors to whom no tender has been made because the so-called tender before the action was one which they were not entitled to accept."

Note.—A remarkable and well-nigh unique feature of this case is that it involves the necessity of a man defending an action to which he does not even profess to have any defence. The holder of the securities could hardly let judgment go by default. It seems unlikely, however, that any such action would run its full course. Either the three months would elapse during its pendency and the act of bankruptcy fall through as a date of possible relation back, or bankruptcy proceedings would be taken and a trustee appointed, with whom the banker or other holder of the security could safely negotiate. Even if the banker or other holder realises his security, as he is at liberty to do, he could not hand over the surplus, if any, to the pledgor, who might bring an action against him for it. Though no method under existing practice immediately suggests itself, there ought to be some means by which the banker or other pledgee could bring the facts to the notice of the Court and leave himself in their hands at an early stage of the proceedings and be released from other than formal participation therein. His costs seem safe, since, as pointed out by the Court, he is in the position of a secured creditor sued for redemption, and the only tender which could support such suit is one he was not entitled to accept, equivalent to none at all. But action or no action, the main thing is that the banker must not accept re-payment of a loan from a man who has committed to his knowledge an act of bankruptcy not three months old, and he must not surrender to that person securities deposited as cover without the sanction of a competent Court. If he does, he may have to refund the payment and make good the securities to the trustee in bankruptcy.

NEWTON *v.* BIRMINGHAM SMALL ARMS COMPANY, LIMITED.

1906. Reported. [1906] 2 Ch. 378. Journal, Vol. XXVII, p. 375.

Reserve Fund—Duty of Auditors to disclose—Companies Act, 1900, secs. 21–23, now Companies (Consolidation) Act, 1908, sec. 113.

THIS was the trial of an action brought by Sir A. J. Newton, suing on behalf of the shareholders of the defendant company, against the company, claiming a declaration that a special resolution passed and confirmed in January and February, 1906, purporting to alter the company's articles of association by inserting provisions therein for an internal reserve fund, was *ultra vires* and invalid, and an injunction to restrain the company and its directors from acting on such resolution. The new article objected to was, so far as material, as follows:—"In addition and without prejudice to Articles 132 and 133" [which related to the formation of and dealing with a reserve fund] "the directors may in any year in which they shall recommend a dividend to be paid on the ordinary shares . . . of not less than 10 per cent. on the amount paid up thereon set aside (without disclosing the fact) out of the earnings or profits in such year remaining after providing the amounts necessary to pay the dividends payable on the preference shares and the dividend which they recommend on the ordinary shares such a sum as they may deem necessary or desirable in the interest of the company as an internal reserve fund, or as an addition to such internal reserve fund when formed, which internal reserve fund shall be held upon the terms and for the purposes following, that is to say—(*a*) The internal reserve fund shall be separate from the reserve fund under Article 132, and need not be shown or disclosed by the balance-sheet, and the directors need not give any information to the shareholders as to the amount, investment, or application thereof, or otherwise in relation thereto, either in their report or otherwise. (*b*) Such internal reserve fund may be invested upon such investments (other than the shares of the company) as the directors may in their absolute discretion think fit, without their being liable for any depreciation of or loss in consequence of such investments. . . (*c*) Such internal reserve fund may be used and applied at the

discretion of the directors for any purpose for which the ordinary reserve fund is available, or for any purposes which the directors in their absolute discretion may consider will serve, protect, or advance the interests of the company, or preserve or promote the value of the undertaking, assets, or goodwill of the company. (*d*) The directors shall disclose the internal reserve fund and the amount thereof, and all additions thereto, and all other particulars in respect of the said fund to the auditors of the company appointed by the shareholders, whose duty shall be to see that the same is applied for the purposes of the company in accordance with the provisions hereinbefore contained, but not to disclose any information with regard to the same to the shareholders or otherwise."

Mr. Justice Buckley delivered judgment as follows:—In February last this company passed special resolutions, the short substance of which is that the directors may, under defined circumstances, set aside (without disclosing the fact) out of the profits sums to form an "internal reserve fund"—a sort of secret service fund—and that this fund need not be shown in or disclosed by the balance-sheet and no information need be given to the shareholders as to its amount, investment, or application; that the directors may invest it as they think fit without being liable for loss in consequence of such investments; that they may apply it for any purposes which they consider will advance the interests of the company; and that, while the particulars as to this fund are to be disclosed to the auditors, it is to be the auditors' duty not to disclose any information with regard to it to the shareholders or otherwise. The question for decision is whether, having regard to secs. 21 to 23* of the Companies Act, 1900, these special resolutions are *ultra vires*. The Companies Act, 1862, was silent as to accounts. Table A (which the company might or might not adopt, as it chose) contained provisions on the subject, but otherwise the Act left the matter untouched, relying, no doubt, upon the application of the ordinary principles applicable as between partners and proceeding upon the footing that the members of a company under the Act are partners in a special sort of partnership modified and governed by statutory provisions. The Companies Act, 1879, sec. 7, contained, for the first time, provisions as to audit of accounts, and was confined to banking companies registered after 1879 as limited companies. The Companies Act, 1900, secs. 21 to 23, for the first time contained provisions as to the audit of the accounts of other companies under these Acts. The provisions of the Act of 1879 and those of the Act of 1900 are closely similar, though not the same; so similar, indeed, that the reason for the difference is

* Now Sections 112-114 of the Companies (Consolidation) Act, 1908.

hard to see. The principal differences that I trace are that the Act of 1879 does, while the Act of 1900 does not, provide affirmatively for an annual audit, and that the Act of 1879 does, while the Act of 1900 does not, provide that if there is no auditor a meeting shall be forthwith called to elect an auditor. As regards the former of the differences, I think that the Act of 1900 (though it does not do so expressly) yet does impliedly provide for an annual audit. Sec. 21, sub-sec. 1,* requires the annual appointment of an auditor to hold office for one year, and the Act contemplates that he will audit during his tenure of office. There will thus result an annual audit. As regards the latter difference, I find that sec. 21, sub-sec. 2,† provides for the appointment of an auditor by the Board of Trade on the application of any member in case an auditor has not been appointed at the annual meeting. Neither statute contains any provision in favour of the public in the matter of publication of the accounts. The two statutes really do not differ, I think, in substance in their result. The question is how far the Act of 1900 goes in requiring for the protection of the members that the accounts shall be open to audit and that the report on them shall be made to the members. The defendants do not dispute that, if and so far as the special resolutions are inconsistent with the Act, it is the Act which must prevail. The concluding sentence of sec. 23‡ requires that the auditor shall state whether the balance-sheet exhibits a true and correct view of the state of the company's affairs as shown by the books. It was argued that these words are satisfied if the auditors report that the balance-sheet does not exhibit a true view and that the statute does not, in these words, say that they shall report what is the true view. This is logically true as regards the language, but, in my judgment, the statute is saved from the reproach of having achieved no more than this impotent result by words earlier in that section, which provide that the auditors are to report to the shareholders on the accounts. A report upon the accounts involves a report of the result of the accounts, and this necessarily involves, as matter of substance if not of form, the statement of a balance-sheet or the equivalent of a balance-

* Now sec. 112 (1) of the Companies (Consolidation) Act, 1908.

† Now sec. 112 (2) of the Companies (Consolidation) Act, 1908.

‡ Companies (Consolidation) Act, 1908, sec. 113 (2): "The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance-sheet laid before the company in general meeting during their tenure of office, and the report shall state (*a*) whether they have obtained all the information and explanations they have required; and (*b*) whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

sheet. There are, I agree, in the Act of 1900 no affirmative words to the effect of what I am about to state, but I think the language of the Act is sufficient to show that by implication it requires that there shall be annually an audit of accounts resulting in a balance-sheet, to the accuracy of which the auditors shall speak. The special resolutions in the present case provide that the balance-sheet shall not disclose the internal reserve fund. It must therefore omit on the assets side of the balance-sheet the assets which make up the amount standing to the credit of that fund and the *contra* item—namely, the credit balance of the fund—on the liability side. The result will be to show the financial position of the company to be not as good as in fact it is. If the balance-sheet be so worded as to show that there is an undisclosed asset, the existence of which makes the financial position better than shown, such a balance-sheet will not, in my judgment, be necessarily inconsistent with the Act of Parliament. Assets are often, by reason of prudence, estimated, and stated to be estimated, at less than their probably real value. The purpose of the balance-sheet is primarily to show that the financial position of the company is at least as good as there stated, not to show that it is not or may not be better. The provision as to not disclosing the internal reserve fund in the balance-sheet is not, I think, necessarily fatal to the special resolutions. The Act, however, provides that the auditors shall report to the shareholders on the accounts examined by them. These auditors will examine, among others, the accounts of the internal reserve fund. A principal question in this case, I think, is whether it is a compliance with these words of the Act that the auditors shall report that they have examined the accounts as to the internal reserve fund, that they are satisfied with them, and that the funds have been employed in manner authorized by the company's regulations, or whether there will be default in complying with the Act if they do not go on to say how the fund has been employed. In my judgment such a report would be a sufficient report within the Act if the auditor is *bonâ fide* satisfied that in making this report, and nothing further, he is truly reporting as to "the true and correct view of the state of the company's affairs." But the special resolutions do not stop there. They provide that it shall be the duty of the auditor not to disclose any information with regard to this fund to the shareholders or otherwise. It is, I think, inconsistent with the Act of Parliament that the auditor shall be bound, even when he thinks that the true state of the company's affairs is affected by the facts relating to the internal reserve fund, to withhold all information with regard to the same from the shareholders. If, for instance, the directors had invested the internal reserve fund upon investments which might involve the company under certain circumstances in enormous

loss, the Act, I think, requires that the auditor shall be at liberty and be bound to report that fact. In reporting upon the accounts submitted to them, the auditors do not, of course, report as to the details of the accounts to which they find no cause to take exception. Their duty is to call attention to that which is wrong, not to condescend upon all the details of that which is right. It is, I think, competent to the statutory majority of the shareholders to say that as to particular items of their business it is to the interest of the corporation that there shall be secrecy, and that the auditors, who must for the purposes of their audit know all such details, shall not, unless their duty under the statute requires it, disclose such details to the members. There is no suggestion in this case that these clauses are intended to be used for any other than a legitimate purpose. Those who are engaged in commerce are familiar with the fact that undue publicity as regards the details of their trade, or as to their financial arrangements, may often be injurious to traders, having regard to the rivalry of competitors in trade, to complications sometimes arising from strained relations between capital and labour, and the like. There are legitimate reasons for ensuring secrecy to a proper extent. It is not, I think, necessary, nor, having regard to the great utility of these Acts, is it desirable to expose persons who trade under these Acts to the necessities of a publicity from which their competitors are free unless such publicity is required to ensure commercial integrity. I am not disposed to look too closely for reasons why I should find clauses such as these to be inconsistent with the Act if I see that the true purpose of the Act is satisfied. I think, however, these special resolutions go too far. Any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled as material for the report which under the Act they are to make as to the true and correct state of the company's affairs, are, I think, inconsistent with the Act. The defendants have left me in some doubt as to the exact position which they take up in the matter. They have desired to obtain the opinion of the Court upon the general question under the Act. They are entitled to do so, and this judgment I hope will put them in possession of my views on the subject, but I am not clear whether they threaten and intend to act upon the resolutions as they stand. They say, truly, that as regards the details of the resolutions, when they know the view of the Court upon the Act of Parliament they can by further special resolutions alter their scheme so as to make it consistent with that view. There are no pleadings, so that it is only from the attitude of the defendants at the Bar that I can ascertain whether they threaten and intend to do the act against which an injunction is sought. It is not according to the practice of the Court to enjoin an act unless the defendants threaten and intend

to do it. I postpone, therefore, for the moment the question of the exact form of the order so that I may hear what the defendants have to say.

Counsel for the company said that the company did not intend to act on the new article in its present form, and suggested that a declaration that it was *ultra vires* so far as inconsistent with the Act of 1900 would be sufficient. It was pointed out that there might be some difficulty in case an appeal was brought from his Lordship's judgment, and, after some discussion, his Lordship granted an injunction to restrain the company from acting on the special resolution, and ordered the company to pay the costs.

Note.—With respect to ordinary companies, the Companies (Consolidation) Act, 1908, does not seem to specifically require a balance-sheet, any more than the 1900 Act, but it obviously contemplates that there will be one, and its wording of sec. 113, set out above, is rather more stringent than that of the preceding Act.

As to limited banking companies, it must be remembered that sec. 108 of the Companies (Consolidation) Act, 1908, prescribes that such companies shall twice in every year make out a statement in the form C in the first schedule to the Act, exhibit a copy thereof in a conspicuous place in the registered office and in every branch office or place where the business of the company is carried on, while every member and creditor of the company is entitled to a copy on payment of sixpence. The prescribed form is practically a balance-sheet, and it is difficult to see how an internal reserve fund such as is referred to in this case could be kept out of it.

[IN THE HOUSE OF LORDS.]

RUBEN AND ANOTHER *v.* GREAT FINGALL CONSOLIDATED AND OTHERS.

1906. Reported. [1906] A.C. 439.

Company—Share Certificate fraudulently issued by Secretary—Forgery—Scope of Employment—Estoppel.

THIS was an appeal from the decision of the Court of Appeal, reported 1904, 2 K.B., 712, allowing an appeal from the judgment of Mr. Justice Kennedy at the trial of an action on admissions of fact after the jury had been discharged, reported 1904, 1 K.B., 650. The action was brought to recover £20,000 damages for the refusal of the defendant company to place certain names on their register of shareholders.

The question involved was whether the company were, in the circumstances, responsible for the fraud and forgery of their secretary, one Rowe, who had been convicted and sentenced to penal servitude for the same.

The facts were as follows:—

The original plaintiffs, Ruben and Ladenberg, were a firm of stockbrokers. Rowe was a member of a well-known firm carrying on business as engineers. He was also secretary of the defendant company, whose business was conducted in the office of his firm. In December, 1892, Rowe, who had frequently done business with the plaintiffs, applied to one of their firm named Lindo to procure a loan of £20,000 on the security of 5,000 shares in the company, which he said were the joint property of himself and a friend in whose name they stood, and who wished to sell them, while he (Rowe) was desirous of acquiring them. The operation was to be carried out by a transfer from the friend in whose name they stood to the proposed lender, who on receiving the certificate would make the required advance. The plaintiffs arranged with a firm of bankers for the required loan on production of the transfer and certificate duly made out in their names. A transfer was accordingly forged by Rowe in the name of one Storey to the bankers by whom it was executed. It was then brought back by Lindo to Rowe to be exchanged for a certificate, which Rowe told him would be passed by the directors and ready for him early

the next day. Lindo paid a registration fee to Rowe of 2s. 6d., and, returning the next day at the appointed hour, received the certificate from Rowe and took it to the bank, who then advanced the money to Lindo, who paid it into his firm's bank and gave Rowe a cheque for the amount, less a deduction for commission. Throughout these transactions, and until he had received the certificate and taken it to his office, Lindo was unaware that Rowe was secretary, though he thought he was a director of the company. Rowe absconded. It was admitted that Rowe had forged the names of the two directors which appeared upon the certificate, and had affixed the company's seal thereto "fraudulently and not for or on behalf of or for the benefit of the defendant company, and solely for himself and for his own private purposes and advantage." It was also admitted that Rowe was "a proper person to deliver the certificate." On discovery of the fraud the company refused to put the bankers on the register. Ruben and Ladenberg were, therefore, obliged to recoup the bank the sum of £20,000, and claimed in this action to recover it from the defendant company on the ground that they were estopped from setting up Rowe's fraud.

The judge of first instance gave judgment for the plaintiffs. The Court of Appeal set aside that judgment and entered judgment for the defendants. The plaintiffs appealed. The House of Lords dismissed the appeal. The Lord Chancellor said he failed to see any principle on which the House could hold the defendants liable. The forged certificates were a mere nullity. The doctrine that persons dealing with limited liability companies are not bound to inquire into their indoor management and are not affected by irregularities of which they have no notice, applied only to irregularities which might otherwise affect a genuine transaction and did not apply to a forgery.

Rowe had not and was not held out as having authority to make any representation or give any warranty that the certificate was genuine. No such authority could be implied from the fact that he held the office of secretary and was the proper person to deliver certificates. The company had throughout nothing to do with the preparation or issue of the certificates.

Lord Macnaghten said the certificate was false and fraudulent from beginning to end. The impression of the seal, though made by the impression of the real seal of the company, was counterfeit, and no better than a forgery. The signatures of the directors were forgeries pure and simple, and every statement in the document a lie. Of itself this fraudulent certificate could give no right against the company.

The fact that it was concocted in and sent forth from the company's office by the company's secretary could not give it an efficacy it did not intrinsically possess. The secretary could have

no authority to guarantee the genuineness or validity of a document which was not the deed of the company. It was not incumbent on the company to lock up their seal and guard it as a dangerous beast.

Lord Davey referred to the proposition stated by Willes, J., in Barwick *v.* English Joint Stock Bank, L.R., 2 Ex., 259, at p. 265: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service of and for the master's benefit." Where the servant, as in the present case, is acting fraudulently for his own illegal purposes, no representation by him relating to the matter, will bind his employers. The representation is part of the fraud, and cannot rightly be considered to be made by the servant as agent or on behalf of his master.

Lord Davey further doubted whether the plaintiffs could set up the certificate as an estoppel, having themselves propounded the forged transfer to the company for registration, referring to Mayor of Sheffield *v.* Barclay, *ante*, p. 85.

Lord James of Hereford suggested that the transferee had a safeguard which the company had not, in that the transferee could apply to the directors whose names appear on the certificate and enquire from them whether those signatures are valid and genuine signatures or not.

Lords Robertson and Atkinson concurred.

Appeal dismissed with costs.

BEVAN *v.* THE NATIONAL BANK LIMITED.

1906. Reported, 23 Times L.R. 65. Journal, Vol. XXVII, p. 491.

Crossed Cheques—Collecting Bank—"Not Negotiable" Account Payee—Crediting as Cash.

THE plaintiff's claim was for damages for the wrongful conversion of cheques belonging to the plaintiff, or alternatively, for money received in respect of the said cheques by the defendants for the use of the plaintiff.

The facts were stated by Counsel opening the case for the plaintiff as follows:—

The plaintiff had in 1894 invested £4,000 on debentures issued by a company called the Malcolm Wade Printing Ink Company. In 1897 the plaintiff commenced a debenture-holder's action, and a receiver was appointed, one Malcolm Lascelles Wade continuing the management. In January, 1898, the plaintiff offered for the goodwill and the assets of the company the sum of £1,800, and in October, 1898, an assignment was in consequence made to him of the business, etc., as from January, 1898. The plaintiff took offices and a factory in his name, and Malcolm Wade continued as manager, the latter receiving from the plaintiff 5 per cent. commission on the gross sales in addition to a *minimum* weekly sum of £7, being £4 per week as salary, and £3 per week for expenses. When the plaintiff took over the business he opened an account for the purposes of the business at a bank in Cheapside, which was subsequently absorbed by Lloyds Bank. The account was opened in the name of "Malcolm Wade and Co., C. M. Bevan, sole proprietor." All cheques were drawn on that bank, the words "Malcolm Wade and Co." being placed thereon by means of a rubber stamp and the plaintiff signing his own name thereunder. Wade had no authority to draw cheques, but had authority to endorse cheques received, and it was his duty to pay all the business cheques into the Cheapside branch of Lloyds Bank. The conduct of the business was left almost entirely in Wade's hands, the plaintiff from time to time visiting the business and receiving reports in relation thereto. The accounts were audited, but no audit was made after the year 1903. Owing to ill-health the plaintiff's attendances on the business became less, and in 1902 there being no profits the plaintiff expressed a wish to sell, or in

default, wind up the business. On April 29th, 1905, Wade died. It was subsequently discovered that Wade had been embezzling and falsifying the accounts, by means of a supplementary cash-book. The defalcations amounted to about £1,800. It was discovered that Wade had opened, in 1902, an account with the defendants' bank in his own name. In the signature-book was the entry "Malcolm L. Wade, trading as Malcolm Wade and Co.," but the account in the ledger was headed and was always worked in the name of "Malcolm Lascelles Wade," Wade having stated to the manager that he traded as Malcolm Wade and Co. Wade would select certain cheques received and enter them, not in the ordinary cash-book, but in the supplementary cash-book, and also post them in the ledger. These cheques he then paid into his private account at the defendants' bank. Some payments were made out of that account by Wade for the purposes of the business, but those were alleged to be less than the payments in. Counsel for the plaintiff contended that the defendants had received cheques so drawn that their attention ought to have been called to the fact that they were not properly receivable by them. Several cheques drawn by various firms made payable to "Malcolm Wade and Co. or Order," were paid into Wade's account at the defendants' bank. Of these all were crossed generally ("and Co."), some were crossed "not negotiable" and "account of payees" in addition, and some were crossed "not negotiable." Wade endorsed these cheques "Malcolm Wade and Co." by means of a rubber stamp, writing thereunder "M. L. Wade." Some cheques were drawn by the plaintiff on Lloyds Bank in favour of "M. L. Wade or Order," and signed "Malcolm Wade and Co., C. M. Bevan," and sometimes the words "account wages" would be added to the cheque; these cheques would be endorsed "M. L. Wade." Counsel contended that the bank ought to have noticed that something was irregular by such cheques being paid into Wade's private account, and had no right to place these cheques to "Malcolm Lascelles Wade's" account. Further that on the very day when the cheques were paid in there had been an immediate credit, entries being made in the ledger and then in the pass-book (thus going further than that done in the case of Akrokerri (Ashanti) Mines, Limited, *v.* Economic Bank, 1904, 2 K.B., 465, *ante*, p. 63), and Wade being allowed to draw against the amount. It was said that there had thus been an immediate credit, and a receipt by the defendants for themselves within the meaning of Capital and Counties Bank, Limited, *v.* Gordon, 1903, A.C., 240, *ante*, p. 35, and an effective credit. The acts complained of being prior in date to the Bills of Exchange (Crossed Cheques) Act, 1906, 6 Edw. VII, c. 17, which was not retrospective, that statute did not apply. The words "not negotiable" ought to have been notice to the bank that the cheque might not be in the

right hands. Those words ought to impose more strictness on the part of a bank than when they were omitted. The defendants alleged that they had received the cheques in good faith, without negligence and for a customer, and were protected by sec. 82. They further alleged that Wade had been held out as sole proprietor or as a person having authority to deal with the cheques. They claimed that so far as the cheques had been used by Wade for Bevan's business, they could set off that amount against the plaintiff's claim.

The contention of their counsel was briefly as follows:—That Wade was a customer and the bank had received payment for him without negligence. That the teller at the bank was not bound to pay particular attention to the name of the drawer of the cheques, nor was it negligence in him not to notice the name of C. M. Bevan on cheques drawn by Malcolm Wade and Co. on Lloyds Bank and paid into Wade's account at the defendants' bank. The entering of the cheques paid in immediately in the ledger was not a giving of credit. Akrokerri (Ashanti) Mines, Limited, *v.* Economic Bank, 1904, 2 K.B., 465. The entries in the pass-book were not made till the following day, though in the case of cheques paid in after 2.30 p.m. the result of the clearing would not then be known. Cheques paid in before 2.30 p.m. would be cleared and the result known before the entries in the pass-book were made. There were two occasions, however, on which the defendants credited Wade before the money had been collected, but in those cases the defendants were protected, because Wade had been held out as a person having authority to deal with the cheques. The plaintiff by his conduct had allowed Wade to act as if Wade had power to deal with the cheques. Ramazotti *v.* Bowring, 7 C.B., N.S., 851, and Harper *v.* Martin, 11 T.L.R., 368. The slightest examination of the books by the plaintiff would have disclosed to him the existence of the supplementary cash-book, and he was negligent in omitting that precaution.

Judgment was reserved, pending the hearing of Bevan *v.* The Capital and Counties Bank, which follows, and will be found at the end of that case.

BEVAN *v.* THE CAPITAL AND COUNTIES BANK, LIMITED.

Reported. 23 Times L.R. 65. Journal, Vol. XXVII, p. 495.

This and the preceding case of Bevan *v.* The National Bank, Limited, were tried successively in the order they stand here. The facts were nearly identical, and judgment was delivered simultaneously in both and follows this case.

The plaintiff's claim was in respect to two cheques paid by Wade into his private account which he had opened at the defendants' bank at a time which was almost simultaneous with the opening by him of the supplementary cash-book referred to in the preceding case of Bevan *v.* The National Bank.

Wade opened this account in the name of "Malcolm Lascelles Wade," and no indication was then given that he carried on business as "Malcolm Wade and Co." Two cheques were paid into Wade's account, the one dated June 23rd, 1901, drawn upon Barclay and Co. in favour of Malcolm Wade and Co. crossed "not negotiable" and "account of payees." The second cheque was crossed "not negotiable." The bank manager, when cheques payable to "Malcolm Wade and Co." were paid in and endorsed by Wade as "Malcolm Wade and Co." did not inquire as to who the "company" was, taking it for granted that there were no partners, and that Wade was trading in that style. Neither of the cheques were credited to Wade before they had been cleared. It appeared from the evidence that a cheque drawn by "Malcolm Wade and Co., C. M. Bevan" had been paid in before the dates of the cheques in question, but the junior clerk had not called the manager's attention thereto. The first cheque crossed "not negotiable" and "account of payees" was for £63 15s., and from the supplementary cash-book it appeared that three items amounting to that sum had been paid out on account of the firm's debts, with the exception, perhaps, of the last item of £5 12s. 6d., which was doubtful. It was contended for the plaintiff that the bank had been guilty of negligence in receiving the cheques.

Channell, J., delivered judgment in the two cases to the following effect:—

In Bevan *v.* The National Bank, Limited, he held—

1. That Wade had been held out by the plaintiff as a partner

in Malcolm Wade and Co., but not as sole proprietor of the business.

2. That this was not material, since what Wade did, namely, pay the firm's cheques into his private account was clearly beyond a partner's authority. As shown hereafter under (11), he held that, in the particular circumstances, the bank's having accepted such cheques, even when crossed "account payee," did not, in his opinion, constitute negligence.

3. That Wade had authority to endorse cheques for the purpose of paying them into Lloyds Bank.

4. That inasmuch as he was held out as a partner, and a partner has authority to endorse cheques, no complaint can be made as to endorsement.

5. It was clear that many cheques besides those sued on had been paid in by Wade in the same way; he gathered that they were not marked "not negotiable." "Obviously there would have been no case as to cheques not so marked, and it would have been practically hopeless for the plaintiff to have sued in respect of them."

As to this see note at end.

6. The twenty cheques in the action against the National Bank and the two in the action against the Capital and Counties were all marked "not negotiable." With regard to them, especially those crossed "account payees," the matter was a little different.

7. The Judge then dealt with the judgments in the Gordon case (*ante*, p. 35), and, following Bigham, J., in Akrokerri (Ashanti) Mines, Limited, *v.* Economic Bank (*ante*, p. 63), he held that crediting as cash in the bank's books did not constitute a bar to protection under sec. 82. His view was that there must be an actual effective credit, communicated, if not acted on, by the customer. An uncommunicated entry might be withdrawn and was a mere convenience of book-keeping. As it is not likely that another case of this sort will now arise, in which the acts complained of occurred before the passing of the Bills of Exchange (Crossed Cheques) Act, 1906, this question is now of no practical importance. It may be pointed out, however, that the passing of that Act affords the strongest possible evidence that the views of Bigham and Channell, JJ., were erroneous. As stated in its title, the Act is an amending, not a declaratory one.

8. He held that a mere entry in the customer's pass-book, the pass-book not being delivered to the customer, stood on the same footing, and did not constitute an effective credit so as to exclude sec. 82. This, even now, is possibly a doubtful point. The

Gordon case did not deal with the pass-book, and the 1906 Act may be read as referring only to the bank's own books.

9. With regard to other allegations of negligence the Judge said as follows:—

Then came the question, Did they receive them in good faith and without negligence? There was no doubt about it that they received them in good faith. But it was said for the plaintiff that it was negligence on the part of the defendants to place cheques which on the face of them were firm cheques to an account which on the face of it was a private account, especially when marked "account of payees." That marking was not provided for by the Bills of Exchange Act. It had grown up in order further to protect the drawer of a cheque against the consequences of it being lost or stolen. It was a direction to the receiving banker that the drawer desired to pay the particular cheque into the bank which kept the account of the payee. To disregard a direction of that kind, if the banker had information which might lead him to think that the account into which he was paying the cheque was not the payee's account would, in his opinion, be negligence. Here the defendants said that they took and paid these cheques into this account because they understood that Wade was trading as Malcolm Wade and Co. He had already held that there was not enough in the case to establish a holding out of Wade as sole proprietor of the business, but those circumstances, which were relied upon by the defendants as showing such a holding out had a material bearing upon the question of negligence, and if the matter stood there alone he should be quite clear that there was no negligence in accepting Wade's statement that he was Malcolm Wade and Co., especially as they had no means of making any inquiry upon the matter. Another point was, however, relied upon as showing negligence. Some months after Wade opened the account, a cheque was paid in to that account drawn by Mr. Bevan upon Lloyds Bank, and it was said that the defendants ought to have seen from that that the proper firm account was with Lloyds Bank, and that the direction "payees' account" meant pay to Lloyds. There were also, beginning at a later date, cheques drawn on the National Bank and paid into Lloyds Bank. It was true that if those things had come before a person in a position to understand banking business they might have raised some suspicion in his mind. The manager had stated that they never came before him, and would only come before a junior clerk, whose duty was to make book-keeping entries, and who never drew the manager's attention to them. There was this further to be said about it that it did not occur until after a considerable number of cheques were paid in, the defendants taking them in good faith in consequence of Wade's statement that he

was the only person trading as Malcolm Wade and Co. That having gone on for some time, one of these three cheques was paid in which might, if it had come before a principal, have excited some suspicion. It never did come before a principal, and upon the whole he came to the conclusion that, as to the great majority of the cheques, the defendants were entitled to the protection of sec. 82 as having received them for a customer, and having done it in good faith and without negligence. If he was wrong in that he thought the only case as to negligence at all was as to such cheques as were crossed "account of payees."

10. With regard to three cheques which had been actually drawn against by Wade before they were cleared he held that payment of these had been received by the bank for themselves and not for the customer, but he afforded the bank a means of escaping liability in the following way:—He said the remaining question was whether there was any answer by the National Bank as to the three cheques he had referred to. The holding out point did not give them an answer, and the other answer he had to deal with was as to what became of the money. It was, he thought, perfectly clear that if Wade improperly paid into his private account the firm's cheque for, say, £52, and after having paid it in he drew out £52 and paid it to Mr. Bevan, the bankers could not be made liable for the £52. Equally, if he paid the £52 straight into Lloyds Bank. In this case they had two ways of getting information as to what became of the money. One, of course, was the bank pass-book, from which, applying the ordinary principle attributing payments in order, could be seen what was the next money drawn out. In this case there was also the supplementary cash-book, in which Wade charged himself with receiving all these cheques and put on the other side payments he professed to have made for the firm. It was clear that he did make the greater portion of these, and it was clear that of the amounts which he paid into his own private account of money belonging to the firm he applied a large portion of it to the payment of the firm's debts. For a time his book balanced, but it was suggested that items entered as paid in respect of trade charges were fictitious items to conceal his fraud. Disregarding these, it was clear that a large portion of the alleged payments were really made, and, so far as these came out of the cheques in question, the defendants were entitled to take credit for them. To take an account would be difficult, and he thought the best plan would be not to direct an account, but to defer giving final judgment until the parties had had an opportunity of looking into these three cheques to see how far the bankers, upon whom the onus rested, could establish that a part, at any rate, of these three cheques went to pay undoubted charges of the firm. He

hoped the parties might be able to come to some agreement about it to save further expense, because it could not be a very large amount either way. Of course, if an agreement were not come to, the case would have to come on again as to the amount. There would be judgment in the first action for the plaintiff for the amount of the three cheques, unless the defendants were able to show that the amounts went to pay trade liabilities of Mr. Bevan's. Turning to the second action, that of Bevan *v.* The Capital and Counties Bank, Limited, he gave judgment for the defendant bank on the following grounds:—His Lordship said that the greater part of what he had already said applied, but it was apparent that no credit was given by the defendants against the cheques. Therefore the two cheques in the second action stood on the same footing as the seventeen cheques in the first action, upon which he had given judgment for the defendants. Another matter had been mentioned. In this case there was no statement by Wade that he traded as Malcolm Wade and Co., but the manager of the bank assumed that he did so, believing him to be a respectable man, because he paid into his account the cheques of Malcolm Wade and Co., and the manager came to the conclusion that Wade traded as Malcolm Wade and Co., and therefore that the cheques were properly paid into his account. There was also the fact that cheques were paid in upon another bank before the earlier of the two cheques, the subject of the action. But, upon the whole, he thought the bank acted in good faith and without negligence. The bank had, however, another answer in respect of the earlier of the two cheques—that for £63 15s. At the time it was received the supplementary cash-book was practically balanced. In that book Wade had entered the cheque, and on the other side there were three items making up that amount. That was equivalent to saying that Wade with the proceeds of the cheque paid those three sums. Two of the items so entered were clearly trade expenses. The third, a sum of £5 12s. 6d., was entered as trade charges, but it was suggested that it was fictitious. He was, however, not satisfied of that; he was inclined to think that the item was a proper charge. The bank, therefore, had an answer as to the cheque for £63 15s. The second cheque was not crossed "account of payees," and there was no ground for saying that the defendants were negligent in dealing with it. There would, therefore, be judgment in favour of the defendants in the second action, with costs.

Note.—Some of the points summarized above seem to call for remark.

From those numbered 3, 4 and 5, it is clear that in ordinary cases it would be negligence to take an order cheque payable to a partnership for the private account of a partner, whatever was

the nature of the endorsement. *Cf. Ex parte* Darlington, etc., Bank, 4 De G. J. and S., 581. Endorsement by a partner in the name of the firm may not be strictly a "per pro" signature, so as to bring the case within sec. 25 of the Bills of Exchange Act. But the firm as a body cannot endorse, the individual partner who endorses on behalf of the firm does so by virtue of his delegated authority as an agent, and this seems to bring in the rule that any signature purporting to be put on by delegated authority must be regarded as a per pro. signature and as indicating limited authority, not only as to the actual signing, but as to the purpose for which the signature is to be utilised. *Cf.* Gompertz *v.* Cook, 20 Times L.R., 106. No doubt there are cases in which an apparently *per pro.* signature may in fact not be such, but an unusual way of signing a trade name, and if satisfactory explanation to that effect be forthcoming it would be unreasonable to refuse to collect the cheque. This seems to have been the line of reasoning adopted by Channell, J., but it is somewhat too condensed in the statement that no complaint could be made as to the endorsements.

The *dicta* as to cheques not marked "not negotiable" referred to above (6) are difficult to follow. Inasmuch as the Judge rejects the idea of the bank becoming holder for value by reason of crediting as cash, it cannot be that he regarded that position of the bank as a defence, one which would further be excluded by the unauthorised character of the endorsements. Dealing, however, with a *nisi prius* decision, the matter is hardly worth pursuing further.

As to "account payee," the Judge clearly intimates that in ordinary cases it would be negligence to take in a cheque so marked for an account other than that indicated. But here, again, circumstances may modify the position. To take this particular case, if the bank were satisfied that Malcolm Wade and Co. was merely the trade name of the individual Malcolm Wade, it would be absurd to refuse to take a cheque payable to Malcolm Wade and Co., crossed "account payee," for the private account of Malcolm Wade. And if, short of actual conclusive demonstration, the bank, after due inquiry, had reason to believe, or even no reason to disbelieve, that Malcolm Wade and Co. and the individual Malcolm Wade were one and the same, it is difficult to see how they would be chargeable with negligence in taking the cheque for his private account.

Point 10 is perhaps the most interesting of the series. Equity naturally prescribes that a man who has had the full benefit of a sum of money should not be entitled to claim it again to the detriment of another person, see Rigby *v.* Reid, 1894, 2 Q.B., 40; Jacobs *v.* Morris, 1902, 1 Ch., 816; Bannatyne *v.* M'Iver, 1906,

1 K.B., 103, which last case, however, would seem to confine the rule to unauthorized borrowing by an agent.

The doctrine may be, as here, useful to a collecting banker when other defences fail, but it is not usual for the perpetrator of a fraud to dispose honestly of the proceeds, save, it may be, of a portion in order to disarm suspicion.

The principle does not, however, go so far as to justify one man in spontaneously and officiously paying the debt of another man and then claiming repayment from him.

[IN THE COURT OF APPEAL.]

LLOYDS BANK LIMITED, *v.* COOKE AND OTHERS.

1907. Reported. [1907] 1 K.B. 794.

Promissory Note—Signature in blank—Authority to fill up to limited amount—Excess of Authority—Holder in due course —Question whether Payee can be—Estoppel at Common Law.

S, ONE of the defendants, signed his name on a blank stamped piece of paper, and entrusted the paper to another person, C, with authority to fill it up as a promissory note for £250 payable to the plaintiffs and to deliver it to the plaintiffs as security for an advance to be made by them to C.

C fraudulently filled up the paper as a promissory note for £1,000 (the stamp being sufficient to cover that amount) and obtained an advance of that amount from the plaintiffs, who had no notice of the fraud.

Held that the defendant, S, was estopped from denying the validity of the note as between himself and the plaintiffs, and that he was liable to them for the full amount of the note.

In the Court below Lawrance, J., on the findings of the jury to the above effect and on the authority of Herdman *v.* Wheeler, 1902, 1 K.B., 361, gave judgment for the defendant, S.

The plaintiffs appealed. The Court of Appeal allowed the appeal.

It had been assumed in the Court below that the whole question turned on the provisions of the Bills of Exchange Act, and whether the immediate payee of a bill or note could be a holder in due course within sec. 29, so as to be entitled to enforce the instrument notwithstanding the previous fraud or defect of authority.

The Court of Appeal held that it was not necessary to decide this point. The Bills of Exchange Act has not abrogated the Common Law doctrine of estoppel, even in its relation to negotiable instruments. The Court held that the case was concluded in the plaintiffs' favour by the rule embodied in the judgment of the House of Lords in Brocklesby *v.* Temperance Permanent Building Society, 1895, A.C., 173, as summarized in the head-note to that case. "Where a principal entrusts an agent with

securities and instructs him to raise a certain sum upon them, and the agent borrows a larger sum upon the securities, and fraudulently appropriates the difference (the lender acting *bonâ fide* and in ignorance of the limitation), the principal cannot redeem the securities without paying the lender all he has lent, although the agent has obtained the loan by fraud and forgery, and although the lender did not know that the agent had authority to borrow at all, and made no inquiry."

That, on this basis, the plaintiffs were entitled to treat the whole sum of £1,000 as properly advanced to C, by the authority of the defendant, S, and therefore as recoverable by them from him, the right to sue not being distinguishable from the right to retain the securities.

On the argument that this doctrine was excluded by reason of the instrument being a negotiable one, which was not the case in Brocklesby *v.* Temperance Permanent Building Society, and by the operation of the Bills of Exchange Act, Collins, M.R., said as follows:—"So far from the fact that the document which was handed to the agent for the purpose of being used as a security, was a negotiable instrument, or was intended to become one, being a reason why the lender of the money should be placed in a worse position for asserting a right on the ground of estoppel, it appears to me to be quite the contrary. I think that all the elements which form the foundation of the estoppel are more easily visible where the instrument which is handed over to be used as a security for an advance is in the form of a negotiable instrument than where it is otherwise; for the intention that the security should be used as a means of raising money is more clearly indicated where the document is in its very nature one which is intended to be transferable from hand to hand as a security for money."

There were many decisions prior to the Bills of Exchange Act showing the liability of a person who put his name to stamped blank paper to anyone who might advance money on the faith of such signature, notably the *dicta* of Butt, L.J., in Baxendale *v.* Bennett, 3 Q.B.D., 525, at p. 531.

Fletcher Moulton, L.J., while agreeing with the view taken by the Master of the Rolls as to the applicability of the Common Law doctrine of estoppel, dealt very fully with the question whether under the Bills of Exchange Act, the immediate payee of a bill or note can or cannot be a "holder in due course," and as such entitled to recover despite previous equities or defects of authorities.

The difficulty in the way of holding the affirmative has always been the definition in sec. 29 (*b*), of a holder in due course that "at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it," negotia-

tion being generally regarded as a dealing with a bill otherwise than between the original parties thereto, see Lewis *v.* Clay, 14 Times L.R., 149; Herdman *v.* Wheeler, *ubi sup.*

Moulton, L.J., starting with the proposition, supported by numerous cases, that prior to the Bills of Exchange Act, a payee could fill the position of a *bonâ fide* holder for value, the admitted antitype of the "holder in due course," says that strong ground needed to be assigned for assuming that it was intended by the Bills of Exchange Act to make an essential change in the law with regard to negotiable instruments by shutting out the payee of such an instrument, who had given full value without notice of anything wrong, from the advantages of the position of a *bonâ fide* holder for value.

Not only could the Lord Justice see no ground for presuming that so radical a change in mercantile law was contemplated by the Act, but he saw in it evidences of intention to continue the existing state of affairs. He referred to sec. 2, which defines "holder" as including payee as well as endorsee, and deduces that, so far, the Act places them on an equality. Then in sec. 30, sub-sec. 2, "every holder of a bill is *primâ facie* deemed to be a holder in due course," and if it is wished to dislodge him from that position, it must be shown that there has been fraud or some other like circumstance in connection with the bill before it reached his hands, and even this only shifts the burden of proof and makes it incumbent on him to prove that he gave value in good faith. He recognises the difficulty imported by the words as to negotiation in sec. 29, if "negotiated" is to be construed as merely equivalent to "endorsed."

But he relies on sec. 31, sub-sec. 1, which, he says, makes it clear that the Legislature intended to make the term "negotiation" apply also to the original operation of transferring the bill to the payee. That section lays down that "a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." It does not say the transferor must be a holder. All that is necessary is that the bill should have been transferred from one person to another in such a manner as to constitute the transferee the "holder" of the bill, that is, by the definition, the payee, no less than the endorsee, who is in possession of the bill.

He therefore concludes that the payee may be holder in due course, and that on that ground, as well as the Common Law estoppel, the plaintiff in the present case was entitled to recover the full amount of the note.

Appeal allowed.

Note.—As pointed out in the subsequent case of Smith *v.* Prosser, 1907, 2 K.B., 735, *post*, p. 151, an essential element in

the estoppel, whether at Common Law or under the Bills of Exchange Act, in cases of this nature is that the instrument should have been entrusted to the agent with the intention that it should become and be issued as a negotiable instrument. Where, therefore, the inchoate instrument is entrusted to an agent for safe custody only, even though it may be contemplated that in certain eventualities and on further instructions, it may ultimately be completed and issued by the agents, the circumstances do not constitute an estoppel, should the agent before the happening of the contemplated events and without the further instructions, part with the instrument, even to a person who takes it *bonâ fide* and for value. See the case above referred to *post*, p. 151.

CURTIS, GARDNER AND CO., LIMITED, *v.* A. CLERET AND CO., LIMITED.

1907. Reported. The Times, May 6th, 1907. Journal, Vol. XXVIII, p. 383.

Acceptance on behalf of Limited Company.

THIS was an action to recover £25 on a bill of exchange. The defence was that the acceptance was not in the form authorised.

It appeared that the bill of exchange, signed by one director and the secretary of the defendant company, had been taken for value by the plaintiffs from one Nicholson, to whom it had been given by the defendants as security, and had been dishonoured on presentation.

Counsel for the defendants said that the defendant company's articles of association, by sec. 106, only authorised cheques to be signed by one director and the secretary, while sec. 105 directed that the seal could be affixed only in the presence of two directors and the secretary. A bill of exchange, he argued, was different from a cheque, as in the former case there would be no counterfoil to act as a guard, nor could the bank make any objection as in the case of the presentation of a cheque. The directors of a company must act as a board.

Counsel for the plaintiffs pointed out that the company had power by their articles of association to draw bills of exchange, and they had the power to delegate to any of their members the right to accept bills of exchange by virtue of sec. 47 of the Companies Act, 1862 (Companies (Consolidation) Act, 1908, sec. 77), and by article 100 of their articles, which enabled the directors to do anything which a company was authorised to do under the Companies Acts. Third parties were not concerned with the internal administration of the company. The plaintiffs were entitled to assume, in the absence of any contrary intention manifest in the memorandum or articles of the company, that this bill of exchange was properly signed in accordance with the powers of the company and with authority.

Mr. Justice Lawrance said that the question was whether it was enough for this bill to be signed by one director and the secretary. He thought that article 106 of the articles of association,

which provided that cheques might be signed by one director and the secretary, clearly showed the intention of the company in matters of this kind, and that it applied to bills of exchange. Judgment for the plaintiffs against the defendant company, with costs on the High Court scale.

Note.—It has frequently been recognised in partnership cases that the power to draw cheques does not import power to draw or accept bills. In Premier Industrial Bank *v.* Carlton, 1909, 1 K.B., 106, Pickford, J., decided that a *bonâ fide* holder could not enforce against the company a bill accepted in the name of the company by one director alone, a resolution of the company requiring that all bills should be signed by one director and countersigned by the secretary. In that case, the business of the company included the drawing and acceptance of bills, and the directors had power to delegate any of their functions to committees consisting of a member or members of their body. Pickford, J., held that the bill had been accepted without authority, and that the holder had no right to presume delegation. The same authorities were quoted in both cases, and the results are not easy to reconcile.

[IN THE COURT OF APPEAL.]

SMITH *v.* PROSSER.

1907. Reported. [1907] 2 K.B. 735.

Promissory Note signed in blank—Deposit with Agent for safe Custody—Fraudulent Negotiation by Agent—Endorsee for Value in good Faith—No Estoppel.

The defendant being in South Africa and about to leave for England, in anticipation of the possibility of money being required during his absence, signed his name on two blank unstamped pieces of paper which were lithographed forms of promissory notes, and handed them to his attorney, Telfer, with a power of attorney and instructions to retain them until the defendant should by telegram or letter from England give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. After the defendant had left South Africa the attorney, without instructions and fraudulently, filled in the blanks in the pieces of paper so as to make them appear to be promissory notes for considerable sums and sold them, unstamped, at Capetown, to the plaintiff, who took them honestly and in good faith and for full value without notice of the fraud. For the purpose of suing upon them in England the notes were subsequently stamped as foreign bills, and Smith sued Prosser for the amount.

The case was tried before Grantham, J., without a jury. He found that the notes had not been properly negotiated to the plaintiff and that he was not entitled to recover, and gave judgment for the defendant.

The plaintiff appealed.

The Court of Appeal dismissed the appeal.

Vaughan Williams, L.J., referred to sec. 20 of the Bills of Exchange Act, which regulates the liabilities of a person who delivers a blank stamped paper with his signature in order that it may be converted into a bill. In South Africa, sec. 18 of the Cape Act is substantially the same. The Lord Justice held that neither of these sections helped the plaintiff's case, inasmuch as they were confined to signatures on paper already stamped. The

question, therefore, had to be decided as in Lloyds Bank *v.* Cooke and others (*ante*, p. 145), on the Common Law doctrine of estoppel.

Following that case the Lord Justice said that if the incomplete document had been handed to Telfer for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument, the defendant would have been liable to a *bonâ fide* holder for value who took it as the plaintiff did.

But it was an essential part of the estoppel and consequent liability that this should be the object and intention with which the inchoate instrument was entrusted to the agent, and this element was wanting in the present case.

Reviewing the authorities, the Lord Justice pointed out that in every case where an estoppel of this sort had been upheld, the party signing the negotiable instrument had parted with it for the purpose of its being negotiated.

That was not so in the present case. At the moment when the inchoate instruments were handed over, no purpose or intention existed in the mind of the defendant that Telfer should negotiate the notes; he only proposed that he should keep them so that they should be ready in case the defendant should at some future time make up his mind that he had need for money which should be raised by their negotiation. Telfer held them as custodian, not as agent for negotiation.

Fletcher Moulton, L.J., was inclined to think, on the facts, that the plaintiff had notice of the power of attorney, and if he had inquired into it, would have discovered Telfer's want of authority to act as he did.

But he based his judgment, like Vaughan Williams, L.J., on the fact that the incomplete instruments had never been given to Telfer for negotiation but only for safe custody.

Both under the Common Law and under sec. 20 of the Bills of Exchange Act, the immediate intention that the document should be converted into a bill of exchange, is essential in order to render the maker liable. If the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and, if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would, in that case, be no *animus emittendi*, and he would therefore not be liable for the act of a bailee who turned the document into a negotiable instrument.

Buckley, L.J., agreed. He said Telfer never had authority to issue the documents as promissory notes, but merely held them for safe custody. He said:—"The recent case of Lloyds Bank,

Limited, *v.* Cooke has no application to the present case. There a person was entrusted with authority to fill up the promissory notes for a certain amount, and he filled them up for too large an amount. But the documents were handed to him for the purpose of issue as promissory notes, while here there has never been a negotiable instrument at all, and the authorities as to negotiable instruments have no application."

Appeal dismissed.

[IN THE HOUSE OF LORDS.]

KLEINWORT, SONS AND CO. *v.* DUNLOP RUBBER CO., LTD.

1907. Reported. 23 Times L.R. 696.

Money paid by Mistake of Fact—Circumstances in which recoverable.

THIS case was the sequel to that of Brandt's Sons and Co. *v.* Dunlop Rubber Co., 1905, A.C., 454, *ante*, p. 91.

In that case on the facts and judgment there set out, Dunlop Rubber Co. had to pay Brandts some £3,000, which, as Lord Macnaghten said, they had paid to the wrong person, viz., Kleinworts, and must pay again to the right person, viz., Brandts, to whom it had been assigned by one Kramrisch, a creditor of Dunlops.

This they did, and then brought the present action against Kleinworts to recover the money paid to them as money paid under mistake of fact.

The payment to Kleinworts was made and received in perfect good faith, the receivers believing it represented a sum due to them for a very similar amount.

At the date Kleinworts received the money they had allowed Kramrisch considerably to exceed an agreed overdraft of £100,000 he had with them. They placed the £3,000 to the credit of this account, and continued it for some time longer, making further advances.

Three questions were left to the jury by Channell, J., who tried the case:—

1. Was the money paid to Kleinworts as principals or agents?

ANSWER: It was paid as agents for Kramrisch.

[This presumably applies to the character in which the payment was made by Dunlops.]

2. Did Kleinworts receive the money as principals or agents?

ANSWER: As principals and in their own right.

3. Were Kleinworts led by Dunlops' mistake to alter their position with regard to Kramrisch to their own disadvantage?

ANSWER: No.

On these findings, the Judge gave judgment for Dunlops, the plaintiffs.

The defendants, Kleinworts, appealed.

The Court of Appeal dismissed the appeal.

Kleinworts appealed to the House of Lords.

The House of Lords dismissed the appeal.

The Lord Chancellor said that their Lordships had heard an interesting and learned argument as to the difference in law between the position of a principal, to whom money has been paid under a mistake of fact, and that of an agent in like case. Dunlops claimed that, in receiving this money, Kleinworts were really principals, and, therefore, liable to repay it, whether they had paid it over to others or not. Kleinworts claimed that the money had been paid to them as agents and that they had accounted for it to their principals in a way equivalent to payment. In the view he took of the case, that was immaterial, for it was indisputable that, if money paid under a mistake of fact is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid, in whatever character it was received.

That was the case here. It had been contended at the trial that Kleinworts would not have continued, as they did continue, to make advances to Kramrisch if it had not been for this payment of £3,000 by Dunlops. The jury by their answer to the third question, refused to accept this view, they considered that Kleinworts would have acted in exactly the same way if no payment had been made by Dunlops at all. There was evidence to support that finding, and so Kleinworts had not altered their position by reason of the payment.

Lord Atkinson, reviewing the authorities, said: "they seem to establish that whatever may in fact be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he will be liable to refund it, if it be established that he dealt as a principal with the person who paid it to him. Whether he will be liable if he dealt as agent with such a person, will depend upon this, whether, before the mistake was discovered, he had paid over the money he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund."

Although Lord Atkinson was not altogether satisfied with the finding of the jury on the third question, he agreed that it could not be disturbed, and that consequently it must be taken that Kleinworts had not altered their position to their disadvantage in consequence of the payment.

The other Law Lords concurred.

Appeal dismissed.

[IN THE COURT OF APPEAL.]

CURTICE *v.* LONDON CITY AND MIDLAND BANK LTD.

1907. Reported. [1908] 1 K.B. 293. Journal, Vol. XXIX, p. 78.

Cheque—Countermand by Telegram.

THIS was an appeal from the decision of a Divisional Court, reported in 23 The Times Law Reports, 594, the main question being the right of a customer to countermand payment of a cheque by telegram. The question was originally raised by an appeal by the defendants from a decision of the Judge of the Marylebone County Court. It appeared that the plaintiff, who was a farmer at Edenbridge, Kent, bought certain horses on October 31st, 1906, paying for them by a cheque for £63 on the defendant bank. While on his way home he sent a telegram to the bank directing them not to pay the cheque. The telegram was sent after bank hours, and the County Court Judge found that it was put into the bank letter-box, and that it did not in fact come into the hands of the bank officials until the morning of November 2nd, whereas it ought to have come to their hands on the morning of November 1st. On November 1st the cheque was specially presented to the bank by post through another bank with a telegraph form attached, the defendant bank being desired to wire whether the cheque was all right. The cheque was in fact paid by the defendants before they had had any intimation of the attempt to stop it. They having so paid it, the plaintiff sued them to recover the amount, the form of action being for money had and received by the defendants to the use of the plaintiff. The County Court Judge gave judgment in favour of the plaintiff, holding that the telegram was put in the letter-box of the bank on October 31st, and was overlooked by the cashier in clearing the box on November 1st, and that defendants must be taken to have received it when they opened their letters for that day; a banker receiving a telegram purporting to stop a cheque disregarded it at his peril, and if defendants in fact received, or must be taken to have received, plaintiff's telegram before the cheque was presented for payment they were responsible for having paid it. The Divisional Court (Mr. Justice Darling and Mr. Justice A. T. Lawrence) held that

there might be a countermand of payment by telegram, but upon the question whether in this particular case there had or had not been a countermand the Court were divided in opinion. Mr. Justice A. T. Lawrence was of opinion that there was no countermand until the contents of the plaintiff's telegram came to the knowledge of the manager of the defendant's branch, and that the defendants, having paid the cheque according to its tenor and without in fact having any notice of any countermand, had done nothing improper, and that an action for money had and received would not lie. Mr. Justice Darling, however, was of opinion that the countermand must be held to have been communicated to the manager on the morning of November 1st when the letters taken from the letter-box were opened, and that the defendants could not be heard to say that the countermand was not effective, as it was due to the default of their own servants that the contents of the telegram had not come to the knowledge of their manager. In these circumstances Mr. Justice Lawrence, as the junior Judge, withdrew his opinion, and the appeal was dismissed. The defendants appealed. The Court allowed the appeal.

The Master of the Rolls read the following judgment:—The question in this appeal is whether a cheque drawn by the plaintiff upon his bankers, the defendants, was countermanded within the meaning of sec. 75 of the Bills of Exchange Act, 1882, by reason of a telegram despatched by the plaintiff to the bank. (His Lordship stated the facts of the case and continued):—Under these circumstances the learned County Court Judge has found that the cheque was countermanded and given judgment for the plaintiff. In the Divisional Court Mr. Justice Darling agreed with the County Court Judge; Mr. Justice A. T. Lawrence took the opposite view. Countermand is really a question of fact. It means much more than a change of purpose on the part of the customer. It means, in addition, the notification of that change of purpose to the bank. There is no such thing as a constructive countermand in a commercial transaction of this kind. In my opinion, on the admitted facts of this case, the cheque was not countermanded in fact, although it may well be that it was due to the negligence of the bank that they did not receive notice of the customer's desire to stop the cheque. For such negligence the bank might be liable, but the measure of damage would be by no means the same as in an action for money had and received. I agree with the judgment of Mr. Justice Lawrence on this point, and that is sufficient to dispose of the appeal. But as we have had an argument addressed to us as to the effect upon the duty of a bank of the mere receipt of a telegram, I wish to add a few words. A telegram may reasonably and in the ordinary course

of business be acted upon by the bank, at least to the extent of postponing the honouring of the cheque until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque. The appeal must be allowed.

The Lords Justices also delivered judgments allowing the appeal.

Appeal allowed.

Note.—Presumably the same principle would apply to a countermand by telephone, but in such case the bank ought to be able by some means to identify the speaker as their customer.

The course prescribed of postponing payment of the cheque on receipt of the telegram is eminently reasonable, and will, no doubt, be followed, but it would seem optional with the holder whether he presents again or treats the cheque as dishonoured.

SZEK *v.* LLOYDS BANK LIMITED.

1908. Reported in The Times, Jan. 15th, 1908. Journal, Vol. XXIX, p. 123.

Account of Undischarged Bankrupt—Dishonour of Cheques—Damages.

This was an action brought by Mr. Joseph Theodore Szek claiming damages from the defendants for breach of contract in not paying out of moneys of the plaintiff in the hands of the defendants four cheques drawn by the plaintiff on the defendants and duly presented for payment, and also for libel in writing the words "Refer to drawer" on the said cheques. The defence was that the plaintiff had concealed from the defendants the fact that he was an undischarged bankrupt, and that the defendants, on discovering the fact, declined to honour the said cheques until they had obtained the consent of the trustee in the bankruptcy of the plaintiff, and, further, that the words complained of were not capable of any defamatory meaning.

It was stated that the plaintiff was an engineer and inventor, who had business dealings with Lord Armstrong, and was employed by the latter in business ventures as his confidential agent. In 1898 the plaintiff became bankrupt in consequence of a judgment which was obtained against him, and at the material time had not obtained his discharge. From time to time Lord Armstrong transmitted to the plaintiff cheques for considerable amounts, and the plaintiff was in the habit of cashing them at the head office of Lloyds Bank. Mr. Bell, the manager of the bank, was aware of the position which the plaintiff occupied. In March, 1906, the plaintiff took a cheque of Lord Armstrong's for £550 to the bank to be cashed, and saw there the chief cashier, who suggested to the plaintiff that it would be more convenient for him if he opened an account at the bank, and offered to introduce him to Mr. Bell with that object. An interview took place between the plaintiff, Mr. Bell, and the cashier, and as a result the plaintiff opened an account at the bank. In October, 1906, the plaintiff had a balance at the bank of £68 11s. 5d., and on November 1st he drew a cheque for £5 in favour of a Mr. Wilmot, a cheque for £45 in favour of Messrs. Cox and Lafone, and a third cheque for £10 in favour of the Heeles Cell and Accumulator Company, Limited, of which the

plaintiff was managing director. On November 3rd he drew a cheque for £7 10s. in favour of the Postmaster-General, the four cheques amounting in all to the sum of £67 10s. On November 5th the plaintiff, at Mr. Bell's request, had an interview with him, at which Mr. Bell told the plaintiff that he had been informed that he was an undischarged bankrupt, and that in consequence the bank would not honour his cheques. The plaintiff then said that four cheques of his were out, whereupon Mr. Bell said that they would be dishonoured. The plaintiff thereupon wrote a letter to the directors of the bank complaining of his treatment, and received a reply from Mr. Bell which stated that Mr. Bell was advised that, as the plaintiff was an undischarged bankrupt, he ought not to pay out any of the plaintiff's money without the consent of the trustee in bankruptcy. The bank subsequently declined to pay to the plaintiff the balance standing to his credit, and the plaintiff then took out a summons under Order XIV to recover the amount. While the summons was pending the bank wrote through their solicitors to the Official Receiver, asking him to intervene, but the Official Receiver, after making inquiries from the plaintiff, declined to interfere in the matter, and the plaintiff eventually obtained the amount of his balance at the bank, with costs against the defendants. The plaintiff contended that the defendants had been guilty of a breach of contract in refusing to honour his cheques, and also claimed damages for libel in respect of the words "refer to drawer" which were written on the cheques and returned to the persons in whose favour they were drawn. It was contended, on his behalf, that an undischarged bankrupt was not only permitted, but was encouraged to earn his own living, and the law protected his own individual earnings. After-acquired property, if it consisted of the bankrupt's personal earnings, belonged to the bankrupt, and it was within the knowledge of the defendants that the money placed to the plaintiff's credit at the bank was the plaintiff's personal earnings. The duty of a bank was to account for every penny which it received from a customer and to pay it to him or his order as he directed.

Mr. Bell, in the course of his evidence, said that bankers did not take the accounts of undischarged bankrupts if they knew of the fact. Had he known the fact of his bankruptcy he would not have taken the plaintiff's account. On November 2nd he discovered that the plaintiff was an undischarged bankrupt, and thereupon wrote asking the plaintiff to call the next day. The first thing he did was to consult his solicitors, and he acted under their advice throughout. On November 5th, when the plaintiff called, witness told him that he was advised by his solicitor not to honour his cheques until he obtained the consent of the Official Receiver. He was afraid that he might have to pay the money

twice over. At the time of the interview the cheques had not come in. One of the Clearing House rules was that certain words should be written on cheques which were not paid. He consulted about it, and considered the words " refer to drawer " to be the only words which could be used in the circumstances. The only meaning was that inquiry should be made of the drawer. The words would be used when a customer arranged not to have less than a certain balance at the bank and gave a cheque which would have the effect of reducing the balance.

In the course of cross-examination he said that he learnt of the plaintiff's bankruptcy from an agent of the Trade Protection Society, who came in to make inquiries, according to custom, about the plaintiff's *status*. On November 2nd witness gave orders that the plaintiff's cheques should be dishonoured. The ordinary meaning of " refer to drawer " was that the bank had not funds to pay the cheque.

Mr. L. Hansard, managing director of Martin's Bank, and hon. secretary of the Institute of Bankers, said that bankers did not knowingly open accounts with undischarged bankrupts. The words " refer to drawer " simply meant refer to drawer for the reason of non-payment.

Cross-examined.—He would not discuss the affairs of customers except with representatives of recognised trade protection societies. If information was sought about the position of customers of a bank it was not given.

Mr. Justice Grantham, in his summing-up, said that the extraordinary part of the case was that the bank knew at the time the cheques were dishonoured that the trustee in bankruptcy had no right to the plaintiff's balance, because, as soon as the plaintiff was requested to call and see Mr. Bell he went and had an interview with him and told him that the money in the bank had nothing to do with the trustee in bankruptcy. Bankrupts were not now prevented from earning money. Under the old law debtors were sent to prison. Now, although they were not allowed to obtain credit beyond a certain amount without disclosing their position, they were encouraged to make money. There was full knowledge on the part of Mr. Bell that the plaintiff's balance did not belong to his trustee, and he also knew that the cheques which the plaintiff paid in represented money belonging to Lord Armstrong, with which the plaintiff was dealing in connection with the Heeles Company. It seemed to his Lordship that the proper course, when it was discovered that the plaintiff was an undischarged bankrupt, would have been to honour his cheques and tell him to close his account. With regard to the claim for damages for libel, the words " refer to drawer " had a very simple meaning—viz., that the cheque had

been dishonoured; and the jury would have to say whether those words constituted a libel on the plaintiff, having regard to the fact that the defendants had failed to show any justification for dishonouring his cheques. If the jury thought it was a case for damages they would probably be disposed to award one sum which would cover the two claims for breach of contract and libel.

The jury found a verdict for the plaintiff, with £250 damages for breach of contract, and nothing on the claim for damages for libel.

Judgment accordingly.

Note.—It may be doubted whether there is absolute unanimity among bankers as to taking the accounts of undischarged bankrupts. There is the obvious difficulty of ascertaining whether moneys paid in are in fact after-acquired property. Opinions differ as to whether accepting the money and paying it out on the bankrupt's cheques together constitute a transaction or dealing with the banker protected within the meaning of Cohen *v.* Mitchell, 25 Q.B.D., 262. *Cf. In re* Clark, 1894, 2 Q.B., 393. The modern tendency is no doubt in favour of facilities in dealing with an undischarged bankrupt, and, very possibly, a banker would now be held protected as to such payments prior to any intervention by the trustee. The trustee can, at any time, claim the credit balance (*Ex parte* Dewhurst, L.R., 7 Ch., at p. 187), but that need not involve loss to the banker.

As to answer on a cheque as possible ground for libel, *cf.* Frost *v.* London Joint Stock Bank, *ante*, p. 116.

As to opinions given by a bank on the position of a customer, see Parsons *v.* Barclay and Co., Ltd., and another, *post*, p. 248.

OETTINGER AND OTHERS *v.* COHN.*

1908. Reported. [1908] 1 K.B. 582. Journal, Vol. XXIX, p. 129.

Stamping of Promissory Notes payable at Sight or on Demand.

THIS was an action to recover a sum of money alleged to be due under a promissory note.

The defence raised a preliminary point that the promissory note in question was insufficiently stamped and could not be sued upon. The plaintiffs were Germans resident in Hamburg, and had had business dealings with the defendants in England. In the course of business they received from the defendants in exchange for other documents outstanding between them a promissory note worded as follows:—"We, the undersigned, severally and collectively promise to pay to Messrs. H. N. Oettinger and Co., or order, at sight the sum of two hundred and fifty pounds sterling, value received." That note was the subject-matter of this action; it was written by the defendants in England and was stamped by them with a stamp of one penny before they sent it out to the plaintiffs; it was written in the United Kingdom and was not expressed to be payable at any place in particular. Schedule I of the Stamp Act, 1891 (54 and 55 Vict., c. 39), provides that a bill of exchange payable on demand or at sight shall be subject to a fixed duty of one penny, and that a "bill of exchange of any other kind whatsoever (except a bank-note) and promissory note of any kind whatsoever (except a bank-note) drawn, or expressed to be payable . . . . in the United Kingdom" shall be subject to an *ad valorem* duty. Sec. 32 of the Act provides that for the purposes of the Act "the expression bill of exchange includes draft, order, cheque . . . . and any document or writing (except a bank-note) entitling, or purporting to entitle, any person, whether named therein or not, to payment by any other person of . . . . any sum of money"; "and the expression bill of exchange payable on demand includes (*a*) an order for the payment of any sum of money by a bill of exchange or promissory note. . . ." And sec. 33 of the Act provides that for the purposes of the Act "the expression promissory note includes any document or writing (except a bank-note) containing a promise to pay any sum of money."

It was contended for the plaintiffs that the document was

* Reported in The Times, Jan. 17th, 1908, under the title: Pettinger and others *v.* Cohn.

stamped as required by the Act. Clearly it came within the definition of a bill of exchange in sec. 32, for it was "a document or writing entitling a person to payment by another person of a sum of money." And on the face of it it was payable at sight, therefore it came within the provision in the schedule, which said that a bill of exchange payable at sight need only bear a penny stamp. True, the document was also a promissory note within sec. 33, but that did not necessarily make it liable to an *ad valorem* duty. The whole difficulty arose from the expression in the schedule "promissory note of any kind whatsoever," but he submitted that the subsequent words in the schedule should not override the clear provisions of sec. 32. The policy of the Act was not to put an *ad valorem* duty on instruments which were payable on demand, but rather on those which would pass by negotiation through many hands.

It was further contended that sec. 32 (*a*) included amongst bills of exchange payable on demand not only ordinary bills of exchange, but every document giving a direction for immediate payment of money. The words as to promissory notes in the schedule must refer only to such kinds of promissory notes as had not already been dealt with in the body of the Act. The document in this case would not come within the schedule, for it was not expressed to be payable in the United Kingdom, nor was it "drawn" there. The word "drawn" was not a word applicable to promissory notes at all; it implied the existence of a third party.

Mr. Justice Channell said he thought the word "drawn" in the schedule must simply mean "written." He had come to the conclusion that the document required an *ad valorem* stamp, and so was useless to the plaintiff. The framers of the Stamp Act had purposely drawn it as wide as possible in order to get every kind of document into the net. The definitions of bills of exchange and promissory notes overlapped, and each kind of instrument might be included in the definition of the other. The document in this case was, he thought, a bill of exchange within sec. 32, and therefore by the schedule liable, as it was payable at sight, to a duty of one penny. But it was also a promissory note within sec. 33; and the schedule was quite clear that promissory notes of any kind whatsoever must pay an *ad valorem* duty, so he thought the higher stamp was required here. Possibly the document was liable to both the penny duty and the higher duty; at any rate, the penny duty alone was not enough.

The preliminary objection was therefore upheld, but Mr. Justice Channell said he thought the case one in which the plaintiffs deserved some consideration, and he therefore adjourned the case upon terms as to costs, and gave the plaintiffs leave to amend and sue if they found they could do so upon the consideration for which the promissory note had been given.

In re T. H. SAUNDERS AND CO., LIMITED.

1908. Reported. [1908] 1 Ch. 415. Journal, Vol. XXIX, p. 277.

Entry of Members' Names on Company's Register.

The question in this case was whether a company was entitled to insist on inserting in its register of members a statement that certain members were entitled as the executors of a deceased shareholder, or whether the members were entitled to have their names entered individually without any qualification—without any statement of the fact of their being executors. The matter arose in this way:—One Thomas Monckton was a shareholder of the above-named company, and held ordinary and preference shares. He died, having made a will appointing his wife and his two sons to be his executors. The will was duly proved by the executors, and on December 11th, 1907, they wrote, with a request signed by them all, to the company, to be registered as members in respect of their testator's shares. The request was not complied with, and on January 6th the company's solicitor, under instructions from the company, wrote to the executors' solicitor, stating that the company persisted in its non-compliance, and saying:—"I have carefully considered the question . . . . and have advised my clients that (though section 25 of the company's articles of association would allow them to do so if they so desired) they are not bound to register the executors in the company's books otherwise than in their representative capacity. . . . . The company has, I am informed, already done this, and there is, therefore, nothing further for it to do in the matter." On January 11th the executors gave the company notice of motion that they would apply to the Court for an order that their names might be entered on the register of members without any qualification. Sec. 25 of the Companies Act, 1862,* enacts that "every company under this Act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:—(1) The names and addresses, and the occupations, if any, of the members of the company, with the addition in the case of a company having a capital divided into shares, of a statement of the shares held by each member,

* *Cf.* Companies (Consolidation) Act, 1908, sec. 25.

distinguishing each share by its number, and the amount paid or agreed to be considered as paid on the shares of each member; (2) the date at which the name of any person was entered in the register as a member; (3) the date at which any person ceased to be a member; and any company acting in contravention of this section shall incur a penalty . . . . and every director or manager of the company who shall knowingly or wilfully authorize or permit such contravention shall incur the like penalty." Sec. 30* enacts that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register." The company's articles of association provided as follows:—"13. The company shall not be bound by nor recognize any equitable, contingent, future, or partial interest in any share, nor (except only as by its regulations otherwise expressly provided) any right or trust in respect of a share other than an absolute right thereto in accordance with its regulations, in the persons from time to time registered as the holders thereof. 14. Every member shall be entitled to a certificate under the seal of the company specifying the share or shares held by him, and the amount paid up thereon . . . . 24. The executors or administrators of a deceased member, not being one of several joint owners, shall be the only persons recognized by the company as having any title to his share or shares. 25. Any person becoming entitled to a share in consequence of the death . . . . of any member, or by any lawful means other than by an ordinary transfer, may be registered as a member upon such evidence of title being produced as may from time to time be required by the directors. 26. Any person who has become entitled to a share in consequence of the death . . . . of any member may . . . . instead of being registered himself, elect to have some person, to be named by him, registered as a transferee of such shares." The executors moved to have their names entered individually and not as executors. The motion now came on for hearing.

Mr. Justice Warrington said that the letter of January 6th plainly showed the object of the company was to exclude the applicants from voting or taking part in the company's affairs or management. The only ground on which the company based its claim to insist on inserting the qualification of the applicants in the register was an alleged necessity or desirability of preserving evidence of the nature of the transmission of the shares. But he considered that was no reason at all. Of course, a company could preserve in proper books a record of the way in which its shares were dealt with; but the question was whether it could preserve such record in its register of members. Could a company add the qualification of a member in its register, and put

* *Cf.* Companies (Consolidation) Act, 1908, sec. 27.

it upon the certificate? In his opinion it could not. A member's strict right, under the Companies Act and the articles of association, was to have his name put upon the register, with nothing more. It might well be, as it was said to be, the common practice of companies to insert the qualification of a member, for it would often be not worth an executor's or other person's while to object. But all that the company was entitled to put was the name, address, and occupation of a member, with a description of his shares and the date. The Companies Act prevented the insertion of anything which might show that the member was not an absolute owner. As to the order in which the names should be entered, the company did not now insist on entering them in any order it chose, and his Lordship did not think it could so insist. The right to settle the order rested with the applicants; they had the right to choose, and they were accordingly entitled to the order which they asked. The company must enter their names without qualification, and pay the costs of the motion.

Order accordingly.

[IN THE HOUSE OF LORDS.]

NORTH AND SOUTH WALES BANK, LIMITED, *v.* MACBETH.

1908. Reported. [1908] A.C. 137. Journal, Vol. XXIX, p. 280.

Cheque—Forged Endorsement—"Fictitious or Non-existing Person"—Bills of Exchange Act, 1882, sec. 7, sub-sec. 3.

THIS was an appeal from a decision of the Court of Appeal (Lord Alverstone, C.J., and Lords Justices Buckley and Kennedy), dated October 16th, 1907, which affirmed the judgment of Mr. Justice Bray of June 30th, 1906. The case is reported, 1907, 1 K.B., 13; 24 Times L.R., 5. The action was brought by the respondent, who was a Writer to the Signet practising at Dunfermline, Scotland, and also local agent at Dunfermline of the Clydesdale Bank, Limited, Glasgow, against the appellants to recover £11,250 damages for the conversion by the appellants of a cheque for that amount, the property of the respondent, or alternatively for the like amount for money had and received by the appellants to the use of the respondent. The cheque was drawn by the respondent pursuant to the terms of an agreement entered into between the respondent, one James Moran Irvine, and one William White in December, 1905. White was manager of a company called White's Carriage Company, Limited. On December 19th, 1905, Irvine and White went to Dunfermline, and at an interview there White informed the respondent (*inter alia*) that he had arranged to purchase 5,000 shares in the company at £2 5s. per share from one T. A. Kerr, a friend of his who formerly lived at Bootle, and was then an engineer residing near Manchester, and that he (White) had arranged to re-sell the shares at £2 10s. per share to a London syndicate. For the purpose of the purchase he asked the respondent if he could arrange to finance the transaction. The respondent agreed to find the money, and it was arranged that he should draw bills to be accepted jointly and severally by White and Irvine and get such bills discounted by his bank (the Clydesdale Bank), and that the shares when delivered by Kerr should be lodged by White with the respondent as security for the advance. The agreement was on the same day signed by White and Irvine, but not by the

respondent, it being necessary for him first to make arrangements with his bank. White suggested that, as the 5,000 shares were being purchased from Kerr alone, the respondent should make out his cheque, not in Irvine's name, but in the name of T. A. Kerr so that the cheque might be handed to him in exchange for the scrip and signed transfers. To this suggestion the respondent agreed. The acceptances of Irvine and White were posted to the respondent on December 21st, 1905, and on the same day the respondent posted to Irvine his cheque for £11,250, having drawn it payable to the order of T. A. Kerr and crossed it. The respondent adopted this mode of drawing the cheque in order to obtain the protection afforded by the necessity of an endorsement by Kerr. On the same date the respondent signed the agreement subject, as therein appears, to the contents of his letters of December 19th and 20th, 1905. On December 22nd, 1905, White obtained possession from Irvine of the respondent's cheque for £11,250, forged T. A. Kerr's endorsement, and paid it into the defendant bank, who forthwith credited it to his account and obtained payment of the amount from the respondent's bank. Kerr had not, in fact, on December 19th, 1905, any shares in White's Carriage Company, Limited, but White fraudulently procured the secretary of the company to forward to the respondent certificates for 5,000 shares in the company. At the time he received the certificates the respondent had no suspicion of any frauds having been committed by White, or of anything being wrong with the certificates. Pursuant to the arrangement made in December with his bank, as stated in respondent's letter to Irvine of December 19th, 1905, the respondent sent the certificates on to his bank as collateral security to them for their advance to the respondent. Early in February White's frauds were discovered, and the respondent claimed repayment of the £11,250 from the appellants. By letter, dated March 7th, 1906, the solicitors then acting on behalf of White's Carriage Company, Limited, informed the respondent that the issue of the certificates was irregular. The respondent at no time claimed any interest in, or title to, such shares, whether the certificates were regular or irregular, and by his counsel at the hearing before Mr. Justice Bray expressly disclaimed any such interest or title.

It was admitted by counsel for the bank that they could not claim protection under sec. 82 of the Bills of Exchange Act. This was because the bank had at once credited the cheque as cash to White's account, the date of their doing so being, as will be observed, subsequent to the decision of the House of Lords in the Gordon case in 1903, and prior to the passing of the Bills of Exchange (Crossed Cheques) Act, 1906.

The House of Lords dismissed the appeal in the terms following:—

The Lord Chancellor.—My Lords, the reasons for deciding this case in favour of the plaintiff are stated so clearly in the judgments of Mr. Justice Bray and of the Court of Appeal that I need not say much in moving your Lordships to dismiss the present appeal. The plaintiff was induced by the fraud of William White to draw a cheque for £11,250, in favour of one T. A. Kerr, or order. T. A. Kerr was an existing person, and when the plaintiff drew the cheque in his favour he intended that Kerr or his transferee should receive the money. White obtained the cheque, forged Kerr's endorsement, paid the cheque into his own account at the defendants', the North and South Wales Bank, and they, on presenting it to the plaintiff's bank, received payment. It was not, in these circumstances, disputed that the defendants were liable to the plaintiff unless they could show that the payee of the cheque, T. A. Kerr, was a "fictitious person" within the meaning of the Bills of Exchange Act, sec. 7, sub-sec. 3. I adopt the language of Mr. Justice Bray—"It seems to me that when there is a real drawer who has designated an existing person as a payee, and intends that that person should be the payee, it is impossible that the payee can be fictitious." If the argument for the appellants were to prevail—namely, that the payee was a fictitious person because White (who was himself no party to the cheque) did not intend the payee to receive the proceeds of the cheque—most serious consequences would ensue. It would follow, as it seems to me, that every cheque to order might be treated as a cheque to bearer if the drawer had been deceived, no matter by whom, into drawing it. To state such a proposition is to refute it. Yet nothing short of this could establish the appellants' contention. As to authorities, I agree with the Court of Appeal in thinking that neither Bank of England *v.* Vagliano, 1891, A.C., 107, nor Clutton *v.* Attenborough, 1897, A.C., 90, governs the present case. I will not discuss the former of those authorities beyond saying that it was not a case in which the drawer intended the payee to receive the proceeds of the bill. And in the latter authority, the payee was a non-existent person whom no one either could or did mean to be the recipient of the proceeds of the cheque. That being so, I think this appeal should be dismissed with costs.

Lord Robertson.—We have been frequently told that the question before us is, What is the meaning of the word "fictitious"? It would be more accurate to say that the question is, What is the meaning of the words "fictitious person"? And I cannot help thinking that at least in the present case, this has not been sufficiently attended to. Dr. Johnson, it is true, gives "counterfeit, false, not genuine," as one meaning of the word "fictitious"; but the illustration given—viz., "fame"—shows that this mean-

ing is applicable to things; he gives another, "feigned, imaginary," and the illustration given is, "The human persons are as fictitious as the airy ones." This last is the sense applicable to persons, and "person" is the word with which we have to deal. Now, I hope I shall not be thought too crude if I say that the present question seems to me to be decided, once we know that T. A. Kerr, so far from being a "feigned or imaginary" person, was a living man, in business, known to the drawer of the cheque and intended by him to receive the proceeds. All that has been said against the cheque does not seem to me to touch this question. The argument, if good for anything, brings within this section all bills obtained by fraud, and credits the Legislature with expressing this by describing the payee as a fictitious person. I am unable to adopt this conclusion. The case of Vagliano is so entirely different in its facts as to be inapplicable to that before us.

Lord Collins concurred.

Appeal dismissed.

Note.—Compare Vinden and Rogers *v.* Hughes, *ante*, p. 81, and note on that case. In the present case, though Kerr was never intended to get hold of the cheque, and could not have enforced it had he done so, by reason of there being no consideration, he was an actually existing individual, present to the mind of the drawer, though not personally known to him, and intended by that drawer to receive the money either by himself or a transferee. In Vinden *v.* Hughes, the payees, being habitual customers, were presumably personally known to the drawer, but, as shown above, this distinction does not affect the principle.

[IN THE HOUSE OF LORDS.]

NORTH AND SOUTH WALES BANK, LIMITED, *v.* IRVINE.

1908. Reported. [1908] A.C. 137. Journal, Vol. XXIX, p. 283.

Cheque—Action for Conversion—Measure of Damages.

THIS appeal was heard immediately after Macbeth's case (reported *ante*, p. 168) and was from a judgment of the same Court of Appeal affirming the judgment of the same Judge. It is reported, 1907, 1 K.B., 13; 24 The Times L.R., 5. The action was brought by the respondent against the appellants to recover £2,300 damages for the conversion by the appellants of a cheque for that amount, the property of the respondent, or, alternatively, for the like amount for money had and received by the appellants to the use of the respondent. The cheque was drawn by the respondent pursuant to an agreement entered into between the respondent and one William White in December, 1905. The respondent and White had had various business transactions together, mostly purchases of businesses for the purpose of re-sale, some of which had been financed by the respondent and some by White. On December 5th, 1905, White informed the respondent that he could buy the business of one Davies for £2,300 and re-sell it for £2,400 to a London syndicate, leaving £100 profit to be divided between them. At White's request the respondent promised to provide the money, and gave to White a cheque for £2,300 drawn upon the respondent's bank payable to Davies or order. On December 5th, 1905, at the time of handing the cheque to White for transmission to Davies the respondent stipulated that the cheque should not be given to Davies until after bank hours on that day, and later in the day informed White that he had only £200 in his bank, and would require the balance paid into his bank to meet the cheque. White accordingly, on December 6th, 1905, advanced to the respondent £1,250 in cash and £865 in cheques, and later in the day, upon the respondent's bank refusing to treat the cheques as cash, a further sum of £865 in cash, making £2,980 in all. Of this sum the respondent returned £800 to White, leaving a net advance from White to the respondent of £2,180. White had, in fact, agreed to buy Davies's business, although for less than £2,300, and on December 8th, 1905, the

purchase was completed. But, in the meantime, White, having forged the endorsement of Davies's name, paid the cheque into the appellants' bank, and the appellants credited his account with £2,300 and obtained payment of the cheque from the respondent's bank. Among other defences the appellants contended that in law the measure of damages was not the value of the cheque, but that value less the £2,180 advanced by White to the respondent.

In this case also, it was admitted that sec. 82 of the Bills of Exchange Act afforded no protection. See note to preceding case.

The House of Lords dismissed the appeal.

The Lord Chancellor.—My Lords, in this appeal two points were raised on behalf of the appellant bank. The first is identical with that raised in the case of North and South Wales Bank *v.* Macbeth, and ought not, in my opinion, to prevail, for reasons I have already stated. The second point made by the appellants is that, assuming the Court of Appeal to be right in giving judgment for the plaintiff, yet the damages ought not to be £2,300, but only £120. Irvine, the plaintiff, was induced by the fraud of one White to sign a cheque for £2,300, payable to John Davies or order. He intended that Davies, who was a real person well known to all concerned, should receive the money. White forged Davies's name and procured his bankers, the defendants, the North and South Wales Bank, to present it, and obtain payment from the plaintiff's bankers. For this the defendants are liable to the full extent of £2,300, unless the following additional fact can in part relieve them. White advanced to the plaintiff £2,180 to enable the plaintiff to meet this cheque for £2,300. So the plaintiff, in fact, has only lost up to the present time the difference—namely, £120. And the defendants urge that he can recover from them nothing beyond this actual loss. I do not think so. I agree with Lord Justice Buckley that the whole £2,300 paid to the defendants was paid out of Irvine's money at his own bankers. Where he got that money is irrelevant. He may have to account for £2,180 of it to White's trustees. I do not know whether it will be so or not. It will depend on the rights between plaintiff and White's trustees. But I see nothing that can entitle the defendants to stand in the shoes of White's trustees and claim against the plaintiff what in effect is a set-off, arising out of an indebtedness of the plaintiff, not to themselves, but to White. If any case could be cited in favour of the defendants' contention, it might be necessary to contrast it with other authorities. But I think there is no such case, and that the law is plain.

Lord Robertson and Lord Collins concurred.

Appeal dismissed. See note to North and South Wales Bank *v.* Macbeth, *ante*, p. 171. Here Davies was stated by the Lord Chancellor to be a real person well known to all concerned, including, that is, the drawer of the cheque. The intention of the drawer and the direction of his mind were therefore more obviously towards a particular individual than in Macbeth's case, but as has been already mentioned, the element of personal knowledge is not essential.

[IN THE COURT OF APPEAL.]

BANK OF ENGLAND *v.* CUTLER.

1908. Reported. [1908] 2 K.B. 208. Journal, Vol. XXIX, p. 285.

Transfer of Stock—Claim against identifying Broker for Indemnity.

The facts were briefly as follows:—In October, 1903, Miss Marian Pearson was the holder of about £1,500 India Three and a-half Per Cent. Stock, and was duly registered as such in the book kept for that purpose at the Bank of England. The duty of keeping such book and recording therein all transfers and dealings with the stock is imposed on the Bank by sec. 9 of 42 and 43 Vict., c. 60, and sec. 7 of 43 Vict., c. 10. Entry in the book is the only recognised method of transfer. The bank require identification of all transferors and keep a list of persons whose identification will be accepted by them. Among such persons are certain stockbrokers, of whom the defendant, Cutler, was one. In October, 1903, one Annie Pearson and one Jeanie Pearson conspired together to misappropriate this stock of Marian Pearson's. They got possession of the stock receipt. Jeanie Pearson, personating Marian, was introduced to Cutler by a solicitor named Bartrum, who had been himself misled, as Marian Pearson. Cutler was instructed to effect a transfer of the stock from Marian Pearson to one Abraham Tottenham, as upon a nominal consideration, the transfer being by way of security for a loan. He accordingly prepared a document known as a ticket, specifying the name of Marian Pearson as transferor, and stating that it was put forward by him. This he sent to the Bank with a notice that he would attend in the course of the afternoon and identify the transferor. From this ticket the transfer was prepared in the transfer book of the Bank. Later in the afternoon Cutler met Annie and Jeanie Pearson at the Bank. The transfer was executed by Jeanie signing the name of Marian Pearson, and the defendant Cutler signed his name in the margin under the words "Witness to the identity of Marian Pearson." A late fee of 2s. 6d. was charged and paid by Cutler, and this, together with a guinea for his services and attendance at the Bank, was paid to him by or on behalf of Jeanie Pearson,

believed to be Marian. Cutler acted absolutely *bonâ fide* and without suspicion throughout. A new stock receipt was made out and delivered to Tottenham. Tottenham ostensibly transferred the stock to Coutts and Co., and it was ultimately sold by them to a Mr. Gibbs, into whose name it was transferred in the Bank's book. Two years later the fraud and forgery were discovered. Marian Pearson called on the Bank to replace her stock and restore her name to the register. This they did by purchasing the requisite amount. They then sued the defendant Cutler to recover the amount expended in purchase of the stock, as damages for breach of an implied warranty that the person identified by him was in fact Marian Pearson. A. T. Lawrence, J., held that the defendant was liable to indemnify the Bank and gave judgment accordingly, 1907, 1 K.B., 889. The defendant appealed. The Court of Appeal, Farwell and Kennedy, L.JJ., Vaughan Williams, L.J., dissenting, dismissed the appeal.

Vaughan Williams, L.J., based his dissent mainly on the ground that mere identification did not necessarily import a request, such as must exist to support a warranty or implied undertaking to indemnify. There was no request, no representation of agency in the present case. Cutler was a mere witness, whose obligation, at the highest, was to take all reasonable precaution in identifying, which he had done. The "ticket" carried the matter no further. It did not constitute or embody a demand or request that the stock should be transferred. The receipt of the guinea did not convert the defendant from a witness into an actor in the transaction. The case, therefore, in his opinion, was not covered by Corporation of Sheffield *v.* Barclay and Co. (see *ante*, p. 85), or Starkey, *v.* Bank of England (*ante*, p. 31), in each of which cases there was a demand or request, express or implied. In his opinion, the appeal ought to be allowed.

Lord Justice Farwell read the following judgment:—The appellant's contention on this appeal raises two points—(1) that the appellant has come under no liability to the bank; and (2) that, if he has, the bank have suffered no damage with which they can charge him. Mr. Justice A. T. Lawrence has decided against both these contentions, and I agree with the conclusion at which he has arrived. The law on the subject has been recently stated by Lord Davey in Mayor, etc., of Sheffield *v.* Barclay, 1905, A.C., at p. 399:—"I think that the appellants have a statutory duty to register all valid transfers, and on demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to re-

move their names and register the stock in the name of the supposed transferee if the latter has, in fact, no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and, without any default on his own part, acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it." The bank in this case have the same duty and are in the same position towards holders of India stock as was the corporation in that case to its bondholders. The only question, therefore, is one of fact—Did the appellant request, direct, or demand the bank to act? Mr. Justice A. T. Lawrence has found as a fact that he did. He says:—"Did then the defendant request or direct the plaintiffs to permit the transfer of this stock to be made? If he did, he comes within the well-established doctrine expressed by Lord Davey in Mayor, etc., of Sheffield *v.* Barclay in these words." Mr. Justice A. T. Lawrence then read part of the passage from Lord Davey's judgment set out above, and continued: "The bank does nothing with regard to the transfer of stock until set in motion by someone. Its only duty is to permit a transfer to be made at the request or by the direction of the stockholder. It then prepares the transfer in the transfer-books without charge. The stockholder can make the request either personally or by agent, and either expressly or impliedly. Did the defendant make it here and represent that he made it on behalf of the true stockholder? He says himself that he was instructed to prepare a transfer and to put a ticket forward. I think the drawing up of this ticket, the taking it to the bank, the payment of 2s. 6d. to get the transfer expedited and made ready on the same day, the attendance at the bank with the proposed transferor, and the identification of the forger as the stockholder constitute, when taken together, as distinct a request to permit the transfer to be made in the books as the 'demand to act' under the power of attorney did in the case of Starkey *v.* Bank of England." He bases his finding on the accumulated facts there stated, and I see no object in discussing what would have been the case if this was an action against a person who had merely appeared to identify a transferor. I express no opinion on the point. But here the appellant is a broker whose ordinary course

of business is to put forward transfers and carry them through. He is also on the Bank's list of privileged brokers, and as such knows that his identification will be accepted as sufficient. He puts forward the forger as the real Miss Pearson on the ticket on which he requests the Bank to prepare a transfer. He attends at the Bank on the execution of the transfer and identifies her, and otherwise acts for reward in the manner described by himself in his account as "attending at the Bank for the purpose of transferring same," and in his book "transferring India 3½ per cent. stock." He put forward and passed the transfer, using his privileged position to identify her. It is to be observed that, although the law as stated by Lord Davey requires the bank or corporation acting to be under a duty to perform a ministerial act on request, it does not require that the person making the request should fill any particular position (see 1905, A.C., at p. 400). It is a question of fact in each case, and I entirely agree with Mr. Justice A. T. Lawrence's finding that the appellant did put forward the forger and request the Bank to accept and register the transfer signed by her. The fact that the defendant was one of the privileged brokers appears to me immaterial; it is a privilege granted to him on his own request and for his own benefit, and in no sense makes him the Bank's agent; and, if it does not amount to this, it seems to me useless as a defence. Nor does it appear to me material that the Bank in case of transfers over £2,000 take further steps to ensure identity. The question is whether it can be said to be "default" on their part not to do so in the smaller cases. I understand the evidence in this case was that "where the amount is below that sum it is impracticable for the Bank to do so." (See 1907, 1 K.B., at p. 892.) I understand that the number of transfers below £2,000 is so large and the necessity for expedition so great that it would be a serious impediment to business in general if such transfers could not be carried through with rapidity. But, however this may be, the finding that it is impracticable excludes any idea of default. Mr. Justice A. T. Lawrence has also found that the appellant was agent in the matter for the alleged transferor and liable on that ground also. I express no opinion on this point, but I prefer to rest my judgment on the rule of law stated by Lord Davey and cited above. Then it is said that the Bank have suffered no loss attributable to the appellant. It is contended that the forged transfer is a nullity (as it undoubtedly was), and that the Bank ought, and indeed were bound to have treated it as such, and to have replaced Miss Pearson's name in their books as the holder of this specific stock. On the facts found by Mr. Justice A. T. Lawrence, this particular stock had passed before action from the original transferee to Messrs. Coutts, the bankers, and from them by sale on the Stock Exchange to Gibbs, a purchaser for value, whose name now stands in the

bank books as the holder on a transfer from Messrs. Coutts. It is plain, therefore, that the bank are estopped from denying Gibbs's title, and could not remove his name *mero motu*. It is true that a title by estoppel is only good against the person estopped, and imports from its very existence the idea of no real title at all, yet as against the person estopped it has all the elements of a real title. What would have been Miss Pearson's strict rights if she had brought an action against the bank and Gibbs it is not necessary to consider. There is, I believe, India 3½ per cent. stock existing to the extent of nearly 70 millions, and Miss Pearson's £1,500 differs in no respect from the remaining millions. Stock has no identity, and it is open to question whether the Court would compel the bank to go through the form of taking off Gibbs's name in order to restore to her that particular £1,500 when she was offered the same sum bought in the market. (See the decree in Barton *v.* North Staffordshire Railway Company, set out in Seton on Decrees, 6th ed., p. 2,308.) But however that may be, I am of opinion that the wrongdoer, however innocent of wilful intention to do wrong he may be, has no equity to compel the bank, whom he has deceived, or Miss Pearson, whose stock he has caused to be removed out of her name, to take any steps to assist him further to embarrass the bank, to cast doubts on the title of all registered holders, or to try and throw the burden on an innocent person's shoulders. To hold the contrary might create that feeling of insecurity and uneasiness in the stockholders referred to in Davis *v.* Bank of England, 2 Bing., 393, where Chief Justice Best, at p. 407, says:—"But to prevent as far as we can the alarm which an argument urged on behalf of the bank is likely to excite, we will say that the bank cannot refuse to pay dividends to subsequent purchasers of these stocks. If the bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stocks they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for the keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the Legislature to give facility to the transfer of shares in the public funds." In my opinion, the appeal fails and should be dismissed with costs.

Lord Justice Kennedy read the following judgment:—Having had the opportunity of reading and considering the written judgment which has just been pronounced by Lord Justice Farwell, I have only a few words to add to the expression of my concurrence in that judgment. It appears to me that upon the main question

—the right of the plaintiffs to claim an indemnity from the defendant in respect of the liability of the plaintiffs to Miss Marian Pearson—the decisive issue is really an issue of fact and the success of the defendant's appeal depends in regard to that main question argued before us upon his being able to satisfy this Court that the finding of Mr. Justice A. T. Lawrence in regard to this issue cannot be supported on the evidence. We are bound to take the law as it has been laid down by the House of Lords in Starkey *v.* Bank of England, 1903, A.C., 114, and later in Mayor, etc., of Sheffield *v.* Barclay, 1905, A.C., 392. The application of that law to the present case hangs, I think, in the particular circumstances upon the answer to one question—is it true as a matter of fact that the defendant "requested, directed, or demanded of" the plaintiffs (to use the language of Lord Davey at p. 399 of the report of the last-mentioned case) that they should permit the transfer in their books of the India stock which the true owner of that stock had not authorised? Or, to put the same question in a slightly different form, did the defendant's conduct, as proved, in fact amount to such a request, direction, or demand? If the question ought to be answered, as my brother A. T. Lawrence has answered it, in the affirmative, then there is, in the circumstances of the present case, nothing upon which, so far as regards the plaintiff's claim to indemnity, the defendant can successfully hope to base a defence. It appears to me that the decision of the learned Judge on this central issue is right. He has held that the proved acts of the defendant, which he sets forth (1907, 1 K.B., at p. 906), and of which the identification of the forger as the stockholder is only one, when fairly viewed together do constitute such a request, direction, or demand. He was, I think, entirely justified in arriving at his result by considering those acts collectively and in the aggregate, and the inference of fact which he drew from such a consideration was, in my opinion, a legitimate inference. If this be granted, then upon the evidence there is nothing else which, according to the principles of the decision of the House of Lords, can properly be treated as wanting to the proof of the plaintiffs' right to indemnity. Upon the further question raised by the defendant's counsel as to the insufficiency of proof of actionable damage, I see nothing that I can usefully add to the judgment of Mr. Justice A. T. Lawrence in the Court below and the judgment of Lord Justice Farwell in this Court.

Appeal dismissed.

[IN THE COURT OF APPEAL.]

CUTHBERT *v.* ROBARTS, LUBBOCK AND CO.

1909. Reported. [1909] 2 Ch. 226.

Banker's Lien on Securities belonging to Third Party—Securities for Loan for Special Purpose—No Lien in respect of General Overdraft.

THIS was an action arising out of certain Stock Exchange transactions which had taken place in 1907 between the plaintiff, Mrs. Cuthbert, and Mr. Fred Cancellor, who was then a member of the London Stock Exchange. It appeared that in September, 1907, the plaintiff was the registered holder of 100 shares in the Provident Clerks and General Guarantee and Accident Company, Limited, which were of the value of about £14 per share. On September 19th, 1907, the plaintiff wrote to Mr. Cancellor, whom she knew as her late father's stockbroker, instructing him to purchase on her behalf shares in the Northern Pacific Railway Company to the amount of £1,000 if he could raise that amount on the security of her Provident shares. On September 20th Cancellor bought for the plaintiff 50 shares in the Northern Pacific Railway at 138½, and on the same day he wrote informing her that he had arranged to get a loan from the defendants, his bankers, and enclosing the contract note. He afterwards sent her a blank transfer of the Provident shares, which he requested her to execute, and a letter of authority to borrow on the shares for her signature. That letter was in the following terms:—"I hereby authorize you to borrow money upon the 100 Provident Clerks shares, Nos. 6,166 to 6,265, for which I have handed you certificates and transfer signed by me." The plaintiff duly executed the transfer and signed the letter, and returned both, together with the certificate for the shares, to Mr. Cancellor. It further appeared that instead of borrowing from the bank the amount necessary and paying for the Northern Pacific shares, Mr. Cancellor carried them over. Accordingly, on October 30th, 1907, he wrote to the plaintiff telling her that he had paid £242 for differences on the shares, which had fallen in value, and that he had borrowed £250 on her account on the security of the Provident Clerks shares. On the same day Mr. Cancellor was declared a defaulter on the Stock Exchange, and he was afterwards adjudicated a bankrupt, his account with the bank being

largely overdrawn. The plaintiff never obtained the Northern Pacific shares, which purported to have been bought for her, and the bank now claimed to be entitled to retain her Provident Clerks shares, which they alleged had been deposited with them by way of security in respect of Cancellor's overdraft. The plaintiff brought this action for an injunction to restrain the bank from dealing with the shares, a declaration that she was entitled to them free from any claim by the bank, and, alternatively, a declaration that she was entitled to redeem the shares upon payment to the bank of the sum of £250 and interest.

Joyce, J., gave judgment for the plaintiff. The defendants appealed.

The Court of Appeal dismissed the appeal and affirmed the judgment of Joyce, J., on the following grounds:—

1. They held that the bank got a good charge for the £250, though that money was not applied in the purchase of shares. There was a request to advance on the security of the Provident Clerks shares. That authority was independent of the security to be afforded by the American shares when purchased. It was immaterial that the documents deposited were not opened or seen by the bank manager.

2. The bank had no charge on the shares for anything beyond the £250. The bank had notice that the shares did not belong to Cancellor. They could not claim a general lien except upon the customer's own property. The transaction between the manager and Cancellor was not a deposit to secure the balance from time to time due on his current account. The deposited authority was only "to borrow money upon" the shares. "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money" (Cozens-Hardy, M.R., at p. 233). But such a transaction is not a borrowing upon a security not belonging to the customer and known to the bankers to be deposited for a special purpose. The mere drawing a cheque by Cancellor, without reference to the security was not a borrowing on the plaintiff's shares, was not intended by him to be an act done in pursuance of the authority, and the bankers could not of their own volition treat it as such. There was no request by Cancellor to lend the money overdrawn on the security of the shares. Any sum beyond the £250, for which security was claimed ought to have gone to the debit of the loan account and credit of the current account, there was no right to debit the loan account in respect of moneys borrowed by way of overdraft on the general account.

Appeal dismissed.

[IN THE COURT OF APPEAL.]

CHAPMAN *v.* SMETHURST.

1909. Reported. [1909] I K.B. 927. Journal, Vol. XXX, p. 278.

Promissory Note—Signature by Director of Company.

THIS was an appeal by the defendant from the judgment of Mr. Justice Channell on the trial of an action without a jury, reported, 1909, 1 K.B., 73. The action was brought on a promissory note, which was dated in September, 1900, and was in the following terms:—"Six months after demand I promise to pay to Mrs. M. Chapman the sum of £300 for value received, together with 6 per cent. interest per annum. J. H. Smethurst's Laundry and Dye Works, Limited. J. H. Smethurst, Managing Director." The words "J. H. Smethurst's Laundry and Dye Works, Limited," and "Managing Director" were impressed by means of a rubber stamp, the remainder of the note being in writing. The money had been borrowed from the plaintiff for the company (of which the defendant was one of the two directors and was the holder of substantially the whole of the ordinary shares) for the purpose of improving the company's premises, and the money was applied for that purpose, and interest was paid from time to time by means of the company's cheques. By its memorandum of association the company had power to borrow money on promissory notes. For the plaintiff it was contended that the defendant was personally liable on the note. For the defendant it was contended that the note was not his note, but the note of the company. Mr. Justice Channell held that the defendant was personally liable on the note, as he had not qualified his promise by the addition of any words to show that he merely signed as agent for the company, and judgment was entered for the plaintiff accordingly. The defendant appealed.

The Court allowed the appeal.

Lord Justice Vaughan Williams said that in his opinion this appeal succeeded. He thought that anyone reading this promissory note would at once say that it was a note which made the company liable. It appeared from the actual note itself that above the signature of the defendant there was a rubber stamp which was the signature of the company, the very signa-

ture which the company were in the habit of making in the conduct of their business. Sec. 47 of the Companies Act, 1862,* dealt with the making of promissory notes and bills of exchange by a company, and was as follows:—"A promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company by any person acting under the authority of the company." There was no question as to authority in this case. It was admitted that the managing director had authority to do what he did with regard to this promissory note. In his opinion if a promissory note was so drawn as to bind a company, and the form of it was such that no question of joint liability or joint makers could possibly arise, it was conclusive of the question which they now had to decide that the note was in such a form that the company was liable on it. And he had no doubt that the company was liable on this particular note. It seemed to him to be impossible to say that, because the defendant had signed this note under words which indicated that the company was liable, therefore he was himself liable on it. Their attention had been called to several authorities. In Lindus *v.* Melrose, 3 H. and N., 177, three directors of a company signed a promissory note in the following form:—"Three months after date we jointly promise to pay F. S., or order, £600 for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited." It was there held that the note was the note of the company, and that the directors were not personally liable on it. In Dutton *v.* Marsh, L.R., 6 Q.B., 361, four directors of a company signed a note in the following form:—"We, the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay J. D. £1,600 with interest at 6 per cent. till paid, for value received." Although the seal of the company was affixed to the note, the Court held that the directors were personally liable. It seemed to him that that was entirely different from the present case. In his opinion it would have been impossible on that note to hold that the company was liable. Then there was the case of Alexander *v.* Sizer, L.R., 4 Ex., 102,† which seemed to him most like

* Companies (Consolidation) Act, 1908, sec. 77: "A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a company if made accepted or endorsed in the name of or by or on behalf or on account of the company by any person acting under its authority."

† The signature in Alexander *v.* Sizer was really "For Misthy Railway Co., John Sizer, Secretary."

the present case. There the note, which began with the pronoun "I," was signed "John Sizer, Secretary." But the Court held that Sizer was not personally liable. In this case there was not any signature of one professing to sign as secretary, but the stamped signature of the company seemed to him to be quite as strong to show that the company intended to be bound. He would not go through the other authorities which had been cited. The cases naturally ran very near each other when the question was whether a particular document made a company or its officers liable. But when once the authority of the managing director to make this document was admitted, he thought they had little more to do than look at the document and ask themselves whether the company could be sued upon it. In his opinion they could be sued. He therefore thought that the appeal should be allowed.

Lord Justice Kennedy and Mr. Justice Joyce delivered judgment to the same effect.

Compare Landes *v.* Marcus, *post*, p. 203.

KEPITIGALLA RUBBER ESTATES, LIMITED, *v.* NATIONAL BANK OF INDIA, LIMITED.

1909. Reported. [1909] 2 K.B. 1010. Journal, Vol. XXX, p. 280.

Action as to Forged Cheques—Negligence—Pass-Book as settling the Account.

In this action the plaintiff company claimed from the defendants the return of £2,400 as moneys paid away by the defendants as the plaintiffs' bankers without their authority; the plaintiffs also claimed interest on £2,400 at 4 per cent. By their points of claim the plaintiffs alleged that the defendants had paid the amount in question upon forged cheques: that those cheques were drawn without the plaintiffs' authority by C. L. Talbot in the name of the plaintiffs as drawers on the defendants, and that Talbot forged the names of the directors of the plaintiffs; that the amounts of the cheques were paid by the defendants to or to the order of Talbot; and that the defendants had wrongly debited the amounts to the plaintiffs' accounts. The plaintiffs further alleged that the defendants were negligent in paying one of the cheques—one for £150—dated December 31st, 1907, in that an alteration made thereon by the substitution of the word "bearer" for "order" did not purport to be initialled.

By their points of defence the defendants denied the plaintiffs' allegations, and alleged that if the cheques were forged or stolen or drawn or paid without authority (which was not admitted) the plaintiffs were estopped and precluded from setting up the matters alleged, in that the plaintiffs had by their conduct and neglect misled the defendants into paying the cheques, and, further that accounts had been stated and settled between the plaintiffs and defendants on the footing that the cheques were properly drawn and paid, and properly debited to the plaintiffs' account with the defendants.

Mr. Justice Bray read the following judgment. This is an action brought by the Kepitigalla Rubber Estates, Limited, against the National Bank of India to recover £2,400, the amount of seven cheques with which the defendants had debited the plaintiffs. The plaintiffs kept an account with the defendants

as their bankers, and contended that the defendants had improperly debited their account with these seven cheques on the ground that the signatures of the directors were forged. The defendants disputed the forgeries, and in addition set up two defences—(*a*) that the plaintiffs had by their conduct and negligence misled the defendants and caused or permitted them to be misled into paying the cheques; and (*b*) that the defendants adopted the cheques and that accounts were stated and settled on the footing that the cheques were properly debited.

The facts proved were as follows:—The plaintiffs were a limited company formed about two years before for the purpose of purchasing estates in Ceylon and planting and cultivating thereon tea, rubber, etc. The estates were purchased and were being cultivated and the produce sold. They employed no one in England except a secretary named Talbot, with whom they made an agreement dated November 19th, 1906, which was put in evidence. He was to receive a salary of £250 a year (afterwards increased to £300), and for that he was to do the work of a secretary, and in addition to supply a registered office for the company, but he was not bound to devote the whole of his time to the business of the company. Talbot at the time he was employed was in the service of Mr. Milne, an accountant, the chairman of the company. He had entered Mr. Milne's service in January, 1906, with an excellent character, and he continued to bear an excellent character down to the date of the forgeries. In order to enable Talbot to perform his agreement with the company he made an arrangement with Mr. Milne under which Mr. Milne provided a room and any necessary assistance from his staff, and he also continued to be in Mr. Milne's service so far as his time was not required for the company's business. At this time he was about 23 or 24 years of age. The first forgery he committed was in relation to a cheque for £150, dated December 31st, 1907, which purported to be payable at Lloyds Bank, Limited, where the plaintiffs also kept a banking account. When the plaintiffs had opened their account with the defendants they gave them a written authority to honour cheques drawn by two directors and the secretary, and for the purpose of enabling the bank to identify their signatures cards were given on which each of the directors and the secretary wrote their signatures. When cheques were required to be signed at times other than at board meetings it was the practice of the secretary to take the cheques to two directors and procure their signatures. At the same time an entry of the cheque was made in a book called the finance-book, and each director when he signed a cheque put his initials in one of two columns in that book opposite the entry of the cheque. In the case of this cheque for £150 the secretary, having filled it up, brought it to Mr. Dick Lauder, one of the

directors, on or within a day or two of December 31st, 1907, and, after giving him some explanation of the purpose for which the cheque was drawn, Mr. Dick Lauder signed it. At the time he so signed it it was a cheque crossed generally, marked non-negotiable, and payable to Lloyds or order. At the same time Mr. Lauder also initialled in the finance-book this entry, being "Lloyds Bank transfer to current account £150." Mr. Lauder had been taken ill some time after this and his memory had been seriously affected, and he was unable to recollect what explanation the secretary had given. I had no reason to believe and cannot find that he acted in any way carelessly in signing the cheque. The secretary, who had been afterwards prosecuted and had pleaded guilty to the forgeries, was not called by either party, and it did not appear except from what was on the face of the cheque itself what he had done, but no doubt he had forged the signature of Mr. Milne by means of a rubber stamp belonging to Mr. Milne. He then altered the "order" into "bearer" and put Mr. Milne's initials to the alteration, also by means of the rubber stamp, and then wrote his own signature and initials. The cheque was afterwards—viz., on January 2nd—presented for payment to the defendants through the Union of London and Smiths Bank and paid. The defendants did not call the cashier or give any evidence as to how or under what circumstances it was paid. The alteration of "order" to "bearer" did not purport to have been initialled by Mr. Dick Lauder. The defendants were not members of the Bankers' Clearing House. On January 9th an ordinary Board meeting of the directors of the plaintiffs was held, at which, according to the usual practice, the finance-book was presented by the secretary. It contained entries of several genuine cheques which had been drawn on the defendants beside the cheque for £150. These were cheques for directors' fees and the secretary's salary. It purported to show in the proper column the initials of two directors opposite the entry of the cheque for £150. There were the genuine initials of Mr. Dick Lauder and the initials of Mr. Milne forged by means of the rubber stamp. It was the practice at all ordinary meetings for the finance-book to be produced and to be inspected by one of the directors other than the chairman, and at this meeting it was in fact inspected by either Mr. Brett, another director, or Mr. Lauder, it was not certain which. Whoever it was failed to notice anything wrong, and a resolution was passed confirming the drawing of this and the other cheques. The resolution was in these words:—"Cheques drawn since last meeting as per finance-book amounting to £691 were confirmed." At the same meeting another cheque, a genuine one for £30, was signed by two directors and entered in the finance-book and in the minutes of the meeting. None of the paid cheques were pro-

duced, nor was the pass-book, but the secretary produced a certificate from the defendant bank of the amount standing to their credit. No inquiry was made, nor could be effectually made without the pass-book, to see whether the amount was correct, and nothing wrong was noticed. The chairman, Mr. Milne, who was called as a witness by the plaintiffs, explained that the object of obtaining the certificate of the balance was in order that they might see what money they had to meet their acceptances coming due and other liabilities. The cash-book was not produced. It was not clear whether the cheque for £30 was signed while in the cheque-book or after it had been torn out. At all events nothing wrong was noticed with regard to the cheque-book. Some evidence was given on behalf of the defendants by two well-known accountants that it was the ordinary course in the City of London to have the cash-book and the pass-book produced at every board-meeting of a company, but I am not satisfied that there was any carelessness on the part of any of the directors or default in the duty which they owed to the shareholders in the conduct of the business of the company at this meeting, though, of course, it would have been possible to have taken extra precautions which would have resulted in the discovery of the forgery. The next meeting of the directors was held on February 6th. It was a special meeting called by telephone at two hours' notice to consider an important and urgent matter—namely, the proposed absence of a Mr. Holland, their manager in Ceylon. No ordinary business was conducted except the passing of some transfers and the signing of and issuing some share certificates. No books at all were produced. By this time the secretary had forged two more cheques—namely, one for £500, dated January 29th, and made payable to himself or order. In that case he had forged the signature of Mr. H. W. Brett, a director, in ordinary writing and the signature of Mr. Milne by means of a rubber stamp. This cheque was paid by the defendants on January 30th. Another cheque for £500 was similarly forged and paid by the defendants on February 5th. There was nothing to excite the suspicion of the directors at their meeting on February 6th, and I am unable to find any carelessness in their conduct on that occasion. I should not have expected that at a meeting called at such short notice for a very special object any books would be called for and produced. On February 6th, probably after the meeting, the secretary forged another cheque for £200 payable to himself or order, which was paid by the defendants on the 11th. On the 8th, another for £300, payable to the Mercantile Bank, London, or order, altered to "bearer," was forged by the secretary and paid by the defendants on the 11th. On the 16th another, payable to C. Talbot (salary account) or order, was forged and paid on the

20th, and on March 2nd another for £250 payable to the Rubber Investment Company, which was paid on March 3rd. On this date at a committee meeting of the Rubber Investment Company, a company of which Talbot was also secretary, the forgeries were discovered by Mr. Milne. Talbot confessed to the forgeries and produced the forged cheques from his pocket and was given into custody. He was sentenced to imprisonment for 15 months only on account of his previous good character. The rubber stamps with Mr. Milne's signature and initials had been provided for him by another company of which he had been a director some three or four years before then, in order that they might be used for signatures to share certificates. He kept them in a small box provided for the purpose with a small Bramah lock, of which he had one key only. This box was kept by Gregg, the cashier (who was called as a witness by the plaintiffs), in a locked drawer in the room where he sat, the key of which was kept by him. The stamps were used occasionally by Gregg on Saturdays (when Mr. Milne was away) to put Mr. Milne's signature to letters which he had dictated the previous evening, but which had not been copied in time for signature that evening. They were also used for signing share certificates of the plaintiff company. On these latter occasions Mr. Gregg handed the stamps to Talbot for the purpose and received them back from him the same day. Between February 10th and February 19th Mr. Milne was away ill and Gregg was in Scotland on business, and during that period Talbot had the key of the drawer and the box. It was not shown how or when Talbot had obtained the stamps. As far as I could see every care was taken of those stamps both by Mr. Milne and Gregg. The box and the stamps were the property of Mr. Milne and not of the plaintiff company, and Gregg was not a servant of the plaintiff company. As regards the pass-book, the defendants called two of their ledger clerks. They proved that whenever the pass-book was called for by a customer they made a pencil entry of "p.b." opposite the last entry in the ledger. This showed that the pass-book had been given to the customer at some date between the date of that entry and the next. There was nothing to show when the pass-book was returned to the bank. When they gave out the pass-book the items were not cast up, but there was a pencil entry in the pass-book of the balance. From the pencil entries in the defendants' ledger it appeared that the pass-book had been taken out on January 3rd, and also on some dates between February 1st and February 5th, between February 6th and February 11th, between February 22nd and March 3rd, and on March 4th. On the last occasion it was taken out by the direction of the chairman, who had then discovered the frauds. There was no evidence to show that the pass-book had ever been in the plaintiffs' office at all

during those times between December 31st and March 4th, and the plaintiffs suggested Talbot had called for it in order to abstract the forged cheques which when paid were put by the defendants in the pocket of the pass-book. It was clear that none of the directors had seen it between the time that the first forged cheque was paid and March 3rd, when the forgery was discovered. I think it is most probable that the plaintiffs' suggestion was correct. It would be quite consistent with the evidence that Talbot should have placed the pass-book in the box provided for pass-books as soon as he had abstracted the forged cheques without ever having taken the pass-book out of the bank's premises. None of the bank's cashiers or officers were called to show that they had been misled into paying any of the cheques by any conduct of the plaintiffs, nor to show what induced them to pay the cheques, nor whether they made any inquiries of the ledger clerks or anyone else as to whether the pass-book had been taken out or as to whether the customer had made any objection to the payment of any of the earlier forged cheques. Probably the cashier paid the cheques because the signatures looked like the signatures of the directors. With regard to the payment of the cheque for £150, where Mr. Lauder had not initialled the alteration from "order" to "bearer," the accountants stated that it was usual for bankers to pay if two out of the three initialled the alteration. It seemed to me, however, that they would do this at their own risk; if Mr. Lauder never initialled or authorised the alteration the payment of the cheque by the bank would not be authorised. But, having regard to the opinion I have formed on other points, I do not think this was of any importance.

Having now stated the facts, I will address myself to the defendants' contentions. It was, of course, clear that the plaintiffs had never authorised or directed the payment of any of the cheques and that the whole of the proceeds had been taken by Talbot. It is true that on January 9th they passed a resolution confirming the drawing of the cheque for £250, but this resolution was never communicated to the defendants, and it was passed in ignorance of the fact that the cheque was forged, and that Talbot had cashed it, received the proceeds, and put them into his pocket. It was, therefore, for the defendants to justify the payment. They contended first that it was a duty of the plaintiffs to them, as their bankers, and as part of the contract between them (*a*) to use reasonable care in the issuing of mandates to the defendants; and (*b*) in the carrying out of their business relating to the issuing of mandates; and if they delegated their duties to another they must use reasonable care to supervise the execution of the duties and to prevent the delegation being abused. I think the cases establish the first part of this proposition. There is Halifax Union *v.* Wheelwright," L.R.,

11 Ex., p. 183. The arbitrator had stated a special case, and in that case he had stated that a person in the service of the plaintiffs, who was employed by them to fill up orders for signature, drew a number of orders in such a way that the words could be increased, and after signature he increased the amounts, which were paid by the treasurer (that is the defendant's clerk), and, after stating these facts, he expressly found that the payment of the excess was solely due to the fact that they were misled by want of proper precaution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature. In other words, the arbitrator found negligent drawing of the drafts by which the defendant was misled, and the Court held that a man could not complain of the consequences of his own default against a person who was misled by that default without any fault of his own. I think Young *v.* Grote, 4 Bingham, 253, as construed by the learned Lords who gave judgment in Scholfield *v.* the Earl of Londesborough, 1896, A.C., 514, is also an authority to the same effect; but the strongest authority is Bank of England *v.* Vagliano, 1891, A.C., 107, where a majority of the learned Lords held that the bank were entitled to debit Vagliano with the amount of certain bills, the payee's endorsement of which was forged, because they had been misled by acts of Vagliano immediately connected with the transaction. I shall have to consider this case further presently.

I should have come to the same conclusion apart from authority. It seems to me to be clearly the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given. That, as has been pointed out, is the duty as between a principal and his agent (see Ireland *v.* Livingston, L.R., 5 H.L., 395), and although the relationship between a customer and his banker is not that of principal and agent, the same considerations would apply. The customer is asking the bank to do something. Surely he should take care that his request is made in such a way as not to mislead his banker. Now, assuming this to be the duty, has it been broken in this case? The plaintiffs gave a clear instruction to the defendants to honour only cheques signed by two directors and their secretary, and they gave the bank genuine signatures of all the directors and the secretary to enable the bank to see if the signatures on the cheques were genuine. So far there was clearly no want of care. It is not uncommon to direct bankers to pay on the signature of one director and secretary. Making the signature of two directors necessary is a strong additional security. What else have the directors done in relation to these cheques? Nothing, except that in the case of the first cheque for £150, one director, Mr. Lauder, signed the cheque, but one

director and the secretary could not give a mandate, and Mr. Lauder's mandate was to pay Lloyds Bank or order. In truth, the plaintiffs have done no acts whatever in relation to the issuing of the mandate, and, further, there is no evidence to show that the bank was misled by any conduct on their part. If the duty is only to take reasonable care in issuing a mandate it is impossible for me to find a breach of that duty.

Therefore it is that the defendants go further and say that there is a duty "to use reasonable care in the carrying out of their business relating to the issuing of mandates." This is a very vague statement of the duty. What is meant, I suppose, is that beyond the care which must be taken in the transaction itself, a customer must, in the course of carrying on his business, take reasonable precautions to prevent his servants from forging his signature, or, if the customer be a company, the directors must take reasonable precautions to prevent the company's servants from forging their signatures. Now, is there any authority for this proposition? I can find none. The Halifax Union case and Young *v.* Grote, as explained in Scholfield *v.* Lord Londesborough, are clearly no authorities, because the breach of duty was in connection with the drawing of the order or cheque. Most reliance was placed by the defendants on Bank of England *v.* Vagliano. It is necessary, therefore, to examine the judgments in that case. Lord Halsbury's decision seems to me to be based on this, that Vagliano by his own acts in relation to the bills themselves misled the bank. Two acts were mainly relied on—first that Vagliano himself accepted the bills as genuine bills when in reality they were not bills at all; second, that by a separate writing, namely, the letter of advice, he told them that the bills of exchange were coming due and were to be paid out of his account, when in fact no such bills of exchange existed. But the learned Lord expressly states on page 115 that he does not dispute that the carelessness of the customer or the neglect of the customer to take precautions unconnected with the act itself cannot be put forward by the banker as justifying his own default. Then follows the passage on the top of page 116 which was much relied on by counsel for the bank. The object of the statements made in that passage was to show that in that case the default was not unconnected with the act or transaction. Those statements show that most clearly when it is remembered that the acts which misled the bank were the acceptance of the bills and the sending of the advice notes by or with the genuine authority of Vagliano himself. There are no circumstances in the present case that have any relation to the circumstances there stated, except possibly the suggestion that Vagliano was bound to know the contents of his own pass-book, but here also the circumstances are quite different in the present case. In

that case there were 43 forged bills extending over a period from February to August. The pass-book was, in the ordinary course of business, sent to the plaintiffs half-yearly balanced up, and was sent during this period with all the entries of debit in respect of these bills and with the forged bills as vouchers, and it was returned by the plaintiffs without objection, whereas in this case there was no half-yearly balance during the period of January and February, and no evidence to show that the pass-book ever reached the company's office. I pass next to Lord Selborne's judgment. I think he bases his decision substantially on the same ground as Lord Halsbury—namely, that Vagliano had himself misled the bank on a material point. Lord Watson at the bottom of page 133 gives as the ground of his decision that the belief that the bills were genuine on which the bank acted was induced and warranted by Vagliano's representation. Lord Bramwell, on page 135, emphatically negatives the bank's contention when he says:—"I think it is necessary for the defendants to show that the plaintiffs caused the defendants to pay these bills. It is not enough to show that they gave occasion for their doing so and that different conduct would have prevented fraud and the payment by the defendants." It seems to me that so far from Vagliano *v.* the Bank of England being in favour of the bank's contention, it is distinctly against it. I have already considered the cases of the Halifax Union *v.* Wheelwright and Young *v.* Grote. They support the first contention that there is a duty to use reasonable care in issuing the mandate, but no further. There are other authorities which are also strongly against the bank's contention. They are Swan *v.* North British Australasian Company, 2 H. and C., 175, Bank of Ireland *v.* Trustees of Evans Charities, 5 H.L. Cases, 389, Mayor, etc., of Merchants of the Staple of England *v.* Governor of the Bank of England, 21 Q.B.D., 160, and finally, Lewes Sanitary Steam Laundry Company *v.* Barclay, Bevan and Company, XI Com. Cases, page 255. Without referring in detail to these they can be summed up by saying that they lay down most clearly that the negligence must be in or immediately connected with the transaction itself and must have been the proximate cause of the loss. It is true that the first three of these cases are not cases between bankers and their customers, but they have always been treated as analogous. The last case, however, is a case of banker and customer, and resembles the present case in many ways, and it would be quite sufficient for me to say that I am bound by that decision.

I think the defendant bank's contention equally fails when it is considered apart from authority. It amounts to contention on the part of the bank that its customers impliedly agreed to take precautions in the general course of carrying on their business

to prevent forgeries on the part of their servants. Upon what is that based? It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the minds of the customer, or, indeed, of the bank when the relationship of banker and customer was created. What is to be the standard of the extent or number of the precautions to be taken? Applying it to this case, can it be said to have been in the mind of the directors of the company that they were promising to have the pass-book and the cash-book examined at every board meeting, and to have a sufficient number of board meetings to prevent forgeries, or that the secretary should be supervised or watched by the chairman? If the bank desired that their customers should make these promises they must expressly stipulate that they shall. I am also inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for the very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible. Assuming, however, that there was a duty on the part of the company to take reasonable precautions to prevent frauds of this kind, have the company made default? I have dealt with this in my statement of facts. I cannot find that they have made default. They have not taken all the precautions that were possible and probably not all that a good many companies do take, but I think they took reasonable precautions. Talbot was a man with the best of characters. There is no evidence of the slightest departure from honesty up to December 31st. According to the minute-book the directors had the pass-book before them four times in the previous half-year. The account was operated on very little. Detection must have come very soon. It was a most improbable thing for a secretary to forge the signatures of two directors. They might well have thought that it was exceedingly unlikely that the bank should have cashed the succession of cheques which they did without inquiry. The whole thing was so very improbable that I do not think that it would have occurred to reasonable prudent directors to do more than they did. I do not inquire whether the bank officials were careless. It is for them to say what precautions they should take in their own interest. They are responsible if they choose to cash forged cheques unless they can show that they have been misled by their customer. In my opinion any defence founded on the conduct of the plaintiffs fails.

Two more points were raised by the defendants (1) that the defendants had confirmed the acts of Talbot in relation to the cheque for £150; (2) that the return of the pass-book without

objection constituted a settled account. As I have stated, the plaintiffs on January 9th passed a resolution that the cheques drawn since last meeting as per finance-book amounting to £691 (which included the £150) were confirmed. This resolution was never communicated to the bank, nor did they ever hear of it. They were not misled by it and did not act upon it. As an act of ratification it fails, because the directors were in ignorance of the facts. Of course, if they had known the facts, they would not have passed the resolution. Mr. Dick Lauder did not know that, wholly unauthorised by him, "order" had been altered to "bearer," and he believed that Mr. Milne's initials in the finance-book were genuine. Mr. Brett, if he was the person who looked through the finance-book, also believed that Mr. Milne's initials were genuine, and Mr. Milne was in entire ignorance of the fraud, and no doubt of the cheque also, and relied on the inspection by one of the directors. The object of the resolution is not so much to ratify the acts of the secretary, but to ratify what they thought had been the drawing of the cheques by the two directors. This defence also fails. The last raises a more important point, though I should add that it was not seriously pressed before me. It is this:—That when a pass-book is taken out of the bank by the customer or some clerk of his and returned without objection there is a settled account between the bank and the customer by which both are bound. I know of no authority in this country for this proposition. The cases on the subject will be found in Sir John Paget's book on the Law of Banking, chapter 12, "The Pass-Book." One of the cases there referred to, Chatterton *v.* London and County Bank, appears only to be reported in the Miller. Sir John Paget has been good enough to let me see that report. That is not, of course, an authorised report, but one cannot read it without being impressed by the fact that it must have correctly stated Lord Esher's language. At all events the language used seems very good sense. The new trial of that case was reported in the Times as well as in the Miller, and the observations of Mr. Justice Mathew on page 159 are most pertinent, and, as it seems to me, most sound. The point was strenuously argued in Vagliano *v.* Bank of England. In the Court of Appeal (23 Q.B.D., on page 263), Lord Justice Bowen says, delivering the judgment of five learned Justices: "There is another point to be considered. The plaintiff from time to time received from the bank his pass-book, with entries debiting the payments made, for which the bank sent the bills as vouchers, which were retained by the plaintiff when he returned, without objection, the pass-books. It was contended that this was a settlement of account between him and the bank, and that he had been guilty of such negligence with respect of the examination of the vouchers as would have pre-

vented him from being relieved from this settlement of account. But there was no evidence to show what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass-book, or that having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the bank or negligence on his part." It will be found that there is nothing in the judgments of their Lordships in the House of Lords casting any doubt on this statement of the law. So far from there having been any evidence before me such as Lord Justice Bowen refers to, there was evidence to show that they desired a settlement of the account and that they took steps for that purpose. Every half-year the defendants sent a form for their customers to sign acknowledging the correctness of the balance. They sent such a form to the plaintiffs on December 31st, 1907, and it was acknowledged as correct. They sent a similar form on June 30th, 1908, with a balance based on the assumption that the forged cheques were properly debited to the plaintiffs, and the plaintiffs refused to acknowledge it as correct. I was referred to an American case, Leather Manufacturers Bank *v.* Morgan. I do not think it necessary to say more about that case than that the facts as stated in paragraph 5 on page 100 are quite sufficient to distinguish it from the present case, and that it has never been acknowledged by any Court or Judge in this country as correctly stating our law. Lastly, there is the case of the Lewes Laundry Company, to which I have already referred. In that case it appears that the real pass-book was seen at least once by the directors when it contained entries of three of the forged cheques, and it was returned without objection; but this was held to be no answer to the plaintiffs' claim. Apart from authority one has only to look at the facts of this case to see how absurd it would be to hold that the taking out of the pass-book and its return constituted a settled account. It would mean this, that a secretary of a company by going to the bank for his own purposes in order to prevent the discovery of the fraud, and without knowledge on the part of any of the directors, and getting the pass-book (with a pencil entry in it of the balance), can bind the company for all purposes.

In my opinion all the defences set up by the defendants fail, and there must be judgment for the plaintiffs for the amount claimed with costs.

Judgment accordingly.

Note.—The use of rubber stamps for signature of cheques, the danger of which is exemplified in this case, has been strongly condemned by banking authorities. Sec. 2 of the Bills of Ex-

change Act says "written" includes printed, and "writing" includes print. A cheque must, however, be not only an order in writing, but must be "signed." A pencil signature has been held sufficient, Geary *v.* Physic, 5 B. and C., 234, and it would be difficult to contend that a stamped or lithographed one was ineffective in view of *ex parte* Birmingham Bank, L.R., 3 Ch. Ap., 653-654. The banker's only attitude towards this unbusinesslike custom appears therefore one of protest.

The case marks another stage in the depreciation of the customer's duty to his banker, and the well-nigh extinct efficacy of the pass-book. While recognising that Chatterton *v.* London and County Bank in the Court of Appeal is nowhere so reported as to be a quotable authority, Bray, J., was obviously influenced by Lord Esher's views therein expressed. It is noticeable that Bray, J., contemplates the tendering and admission of evidence of implied contract with regard to the pass-book, such as was suggested by Bowen, L.J., delivering the judgment of the majority of the Court of Appeal in Vagliano's case. Such evidence must be possible, otherwise the words of the Court of Appeal are senseless, but it has been somewhat plausibly suggested that evidence from the banker's point of view alone would not carry much weight with a Court, and that it would not be easy to obtain evidence of customers sufficient to establish a general custom or implied contract.

[IN THE PRIVY COUNCIL.]

CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

1909. Reported. [1909] A.C. 369. Journal, Vol. XXX, p. 341.

Liability on Bills of Lading.

THIS was an appeal from a judgment of the Supreme Court of the Straits Settlements of September 24th, 1907, affirming a decision of Mr. Justice Thornton.

Lord Macnaghten, in now delivering their Lordships' judgment, said the appellants, the Chartered Bank of India, Australia and China, were holders for value of bills of exchange drawn against bills of lading under which goods were to be carried to Penang and delivered there to order or assigns. The carrying vessel was the ss. "Teesta," one of a line of steamers belonging to the respondent company. The bills of exchange, which were drawn upon S. Fareeth and Co., of Penang, had been discounted by the bank, and the bills of lading endorsed in blank were held by the bank as security for their advance. The "Teesta" arrived at Penang on August 10th, 1905. On her arrival the cargo intended for Penang was delivered overside into lighters and taken to the wharf.

It was the practice for the owners of steamers calling at Penang to appoint landing agents at that port. The business of the landing agents was to send lighters to meet an incoming vessel belonging to their employers on being furnished with a copy of the ship's manifest. The goods were discharged from the ship's tackle into the lighters. The landing agents gave the master a clean receipt, if they were received in good order. The goods were then carried to jetty sheds, held under lease from Government, landed there, and assorted by the landing agents ready for delivery to the consignees on production of the bill of lading endorsed by the ship's agents with a delivery order. If the consignees applied for their goods within 96 hours they got them free of store rent; if not, the goods were either kept in the jetty sheds or removed to godowns. The landing agents made out their account of the landing charges and storage rent, if any, accord-

ing to a scale of charges exhibited in the offices of the ship's agents. They received payment direct from the consignees. The endorsement of the bill of lading by the ship's agents was required as a release of the ship's lien for freight and expenses incurred on the shipment. Without such endorsement the landing agents were not at liberty to deliver goods to consignees. That practice, which was obviously for the convenience of all parties concerned, appeared to be at present the subject of much controversy in Penang. The shipowners contended that the landing agents were the agents of the merchants. The merchants insisted that they were not their agents, but the agents of the shipowners. Neither view, perhaps, was quite accurate. These landing agents rather seemed to be in the position of intermediaries owing duties to both parties—agents for the shipowners as long as the contract of affreightment remained unexhausted, agents for the consignees as soon as the bill of lading was produced with delivery order endorsed. The point, however, was not material for the determination of the question now at issue, and their Lordships therefore did not propose to discuss it further or to define the exact position of landing agents at the different stages of their employment. The bills of exchange in the hands of the bank were duly accepted by S. Fareeth and Co. on the arrival of the "Teesta." On presentation for payment they were dishonoured. Application was then made to P. Bob and Co., the landing agents of the respondent company. The appellants produced the bills of lading with delivery order endorsed and claimed the goods. The goods were not forthcoming. They had been taken away without the production of a bill of lading or a delivery order by the representative of S. Fareeth and Co., acting in collusion with the representative of P. Bob and Co., and they had been already disposed of, in fraud of the persons entitled.

Having thus lost both their money and the goods which had been pledged to them as security, the bank preferred their claim against the respondents. The claim resulted in the present action. The appeal had been brought from the order of the Supreme Court affirming the judgment of the Court of first instance, which dismissed the action with costs. Both here and in the Courts below the respondent company disclaimed all liability, relying on conditions subject to which the bills of lading were expressed to be issued. They were printed at the foot of the bill of lading, and attention was called to them in the body of the bill. The only conditions material in the present case were those intended to be applicable on the arrival of the carrying vessel at the port of destination. They were contained in the following clause:—"The company is to have the option of delivering these goods or any part thereof into receiving ship

or landing them at the risk and expense of the shipper or consignee as per scale of charges to be seen at the agent's office, and is also to be at liberty until delivery to store the goods or any part thereof in receiving ship, godown, or upon any wharf, the usual charges therefor being payable by the shipper or consignee. The company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." On behalf of the respondents the contention was that the obligations they undertook were fulfilled by delivering the goods to the landing agents, and that at any rate their liability ceased when the goods were once "free of the ship's tackle." On the other hand, it was said on behalf of the bank that the landing agents were neither the assigns nor the agents of the shippers or consignees, and that the goods had never been delivered in accordance with the bills of lading. As regarded the provision for cesser of liability, the suggestion was that it applied only to the interval between the removal of the goods from the ship and their being landed on the quay. In addition to the arguments relied on in the Courts below, the learned counsel on behalf of the bank prayed in aid two recent decisions of the House of Lords—Elderslie Steamship Company, Limited, *v.* Borthwick, 1905, A.C., 93; Nelson Line (Liverpool), Limited, *v.* James Nelson and Sons, Limited, 1908, A.C., 16—in which the House had occasion to re-affirm and apply the wholesome rule that, if a shipowner wished to relieve himself from liability to the shipper in case his vessel should be found to have been unseaworthy, he must say so plainly. That was an old rule. It had never been questioned or doubted. But their Lordships did not recognise any very close analogy between a case where it was sought to get rid of a legal obligation which was presumed to be the basis of every contract of carriage by sea and a case like this where the parties were perfectly free to make any stipulation they pleased unembarrassed by any implied condition, or any original underlying obligation.

In order to lay a foundation for their arguments the learned counsel for the appellants examined the bills of lading and the conditions attached to them, casting about everywhere for some contradiction or some ambiguity. They put cases suggested as occurring at other stages of the voyage in which the clause providing for cesser of liability could not apply. They found fault with the position of the provision in the particular clause where it occurred. They even took exception to its language. Liability was to cease when a certain thing was done; it was to cease

"thereupon": the word, they said, would have been "thereafter," not "thereupon," if the immunity stipulated for had been meant to be lasting. So minute and searching was the criticism. Now, it might be conceded that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and it might be admitted that bills of lading could not be said to be spent or exhausted until the goods covered by them were placed under the absolute dominion and control of the consignees. But their Lordships could not think that there was any ambiguity in the clause providing for cesser of liability. It seemed to be perfectly clear. There was no reason why it should not be held operative and effectual in the present case. They agreed with the learned Chief Justice that it afforded complete protection to the respondent company. Their Lordships therefore would humbly advise his Majesty that the appeal should be dismissed. The appellants would pay the costs of the appeal.

LANDES *v.* MARCUS AND DAVIDS.

1909. Reported. 25 Times L.R. 478. Journal, Vol. XXX, p. 345.

Liability on a Cheque—Form of Signature.

THIS was an action by Mr. Solomon Landes to recover £37 15s. 8d. upon a crossed cheque dated December 10th, 1908. The cheque was stamped near the top with the words B. Marcus and Co., Limited, and was drawn in favour of the plaintiff or order by the two defendants, their signatures being in the following form:—"B. Marcus, Director. S. H. Davids, Director. ———, Secretary." The space for the signature of the secretary was left blank. The name of the company did not appear anywhere except at the top of the cheque. The plaintiff contended that the defendants were personally liable upon the cheque and he relied on secs. 26 and 55 of the Bills of Exchange Act, 1882, and Dutton *v.* Marsh, L.R., 6 Q.B., 361. The defendants contended that they were not liable and that the cheque was drawn on behalf of B. Marcus and Co., Limited, and they cited Alexander *v.* Sizer, L.R., 4 Ex., 102, Chapman *v.* Smethurst, 1909, 1 K.B., 927, Lindus *v.* Melrose, 27 L.J., Ex., 326, and Dermatine Co. *v.* Ashworth, 21 The Times L.R., 511. Two directors had authority to sign cheques on behalf of the company. The cheque was stated to have been drawn for goods supplied by the plaintiff to the company. The Bills of Exchange Act, 1882, sec. 26 (1) provides:—"Where a person signs a bill as drawer, endorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal or in a representative capacity, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability."

Mr. Justice Jelf, in giving judgment, said that it was said that the defendants signed only in their capacity as directors of the company. It was necessary to look at sec. 26 of the Bills of Exchange Act, 1882, to see what the defendants' position was. In drawing this cheque the defendants had not said that they did so on behalf of the company, but they had added words showing that they signed in a representative capacity and that

brought them exactly within the words of sec. 26 (1). It was said that the words "B. Marcus and Co., Limited," at the top of the cheque showed that the defendants signed only as directors of that company, but the case of Dutton *v.* Marsh, *supra*, showed that they and not the company were liable. By virtue of sec. 55 of the Bills of Exchange Act, 1882, the drawer of a bill engaged that it would be paid according to its tenor, and therefore this case was exactly the same as if the defendants had said "We promise to pay," and if they had done that they would, on the authority of Dutton *v.* Marsh, *supra*, be liable. There must therefore be judgment for the plaintiff for the amount claimed with High Court costs.

Judgment accordingly.

Note.—This case has sometimes been regarded as inconsistent with Chapman *v.* Smethurst, *ante*, p. 183. It is not really so. In Chapman *v.* Smethurst, the name of the company was impressed by an authorised person on that part of the note where the signature would in the ordinary course appear. The note was therefore duly executed on behalf of the company under sec. 47 of the Companies Act, 1862, or sec. 77 of the Companies (Consolidation) Act, 1908, though the class of execution is not one favoured by bankers. The addition by the managing director of his signature and description did not nullify the real execution on behalf of the company, and was merely in the nature of an attestation or expression of authority. The only anomaly was that the note was in terms a personal promise, "I promise to pay," but the Court, on the authorities, held this not sufficient to displace the liability of the company. In Landes *v.* Marcus, the name of the company appeared nowhere except at the top of the cheque. It did not purport to be and could not be reasonably interpreted as being an execution by or on behalf of the company. It might fairly suggest reference to the account to which the cheque was to be charged. The directors by their signature and its form brought themselves directly within the liability imposed by sec. 26 of the Bills of Exchange Act.

Consequent on this case, questions arose as to the right of the banker to debit a company's account with cheques drawn by directors in such form as to make themselves and not the company liable.

Provided the instructions as to paying cheques are strictly followed, the right appears established by Mahoney *v.* East Holyford Mining Co., L.R., 7 H. of L., 869, 884, 889. In that case the company was a limited one under the Act of 1862, and the cheque did not bear the name of the company. At p. 889 Lord Cairns, C., says: "The question being merely as to the authority given to the bankers to make the payment, it appears to me

that when those who drew and those who honoured the cheque knew the account on which it was intended to operate, the result was the same as if the account had been mentioned on the face of the cheque, and that no distinction is to be made as to the money paid on these cheques."

In the opinion delivered by the judges summoned to advise the House, at p. 883, it is also stated, "It is only further necessary to notice the objection to the form of the cheques made at your Lordships' Bar. We do not think it necessary to enquire whether the bankers were bound to honour cheques so informally drawn. Probably they might have objected and required more formal vouchers. Neither do we enquire whether the cheques sufficiently on the face of them indicated that the company was the drawer, so as to enable a holder to sue them as drawers within the Law Merchant. Perhaps they did not. We think it enough to say that (assuming that those who signed had authority to draw for the company) the bankers have a sufficient voucher when they produce an order to pay the money, really signed by those persons, really acting under their authority, though it may be that that authority was exercised in an informal manner."

LONDON AND PROVINCIAL BANK LTD., *v.* TOTTENHAM URBAN DISTRICT COUNCIL.

1909. Reported in The Times, April 5th, 1909. Journal, Vol. XXX, p. 346.

Liabilities of a Local Authority.

This was a claim by the plaintiffs for £4,910, being money lent to the defendants, and for a declaration that the plaintiffs were entitled to stand in the place of, and have all the rights of, certain creditors of the defendants whose lawful demands had been paid out of the said sum of £4,910. The plaintiffs also claimed a *mandamus* directing the defendants to make and levy a rate in order to pay the sum of £4,910.

Counsel for the plaintiffs said that the facts, as to which there was no dispute, were briefly these. Since January, 1906, the defendants, being the municipal authority for Tottenham, had an account with a branch of the plaintiffs' bank at Tottenham. Between January 16th, 1906, and May 19th, 1908, the defendants borrowed from the plaintiffs £18,089 by way of overdraft, cheques to this amount being drawn upon the bank. £13,179, part of this sum, was paid off, leaving £4,910 still owing. It was conceded, on the part of the plaintiffs, that having regard to the cases of Smith *v.* Southampton Corporation, 1902, 2 K.B., 244, and Attorney-General *v.* De Winton, 1906, 2 Ch., 107, they could not now recover this amount as an ordinary debt; but it was contended that there had been subrogation. Thus it was alleged and admitted that the whole of the said sum of £4,910 had been devoted to paying creditors of the defendant council having legal and enforceable claims, and that, the plaintiffs' money having been used to pay the creditors, the plaintiffs were entitled to stand in the place of such creditors and to be paid the sum of £4,910, which had become due and owing. Counsel referred to a number of authorities, including *Re* Cork and Youghal Railway Company, 1869, L.R., 4 Ch. App., 748, Blackburn *v.* Cunliffe, Brooks and Co., 1882, 22 Ch. D., 61, and Bannatyne *v.* McIver, 1906, 1 K.B., 103. With regard to the claim for a *mandamus* to levy a rate, that was not now pressed, inasmuch as there was an action pending in the Chancery Division by the Attorney-General against the defendant council.

Counsel for the defendants said that he could not resist judgment for the amount claimed. The substantial point in dispute —namely, the *mandamus*—would have to be postponed.

Mr. Justice Hamilton delivered judgment for the plaintiffs with costs.

Note.—The Attorney-General sought to intervene in this action, but the Judge held that counsel appearing on his behalf had no *locus standi*. In the action by the Attorney-General in the Chancery Division, referred to above, the Court held that the loan of £4,910, by way of overdraft, for which no sanction had been obtained from the Local Government Board was illegal, and that the council must be restrained from applying any part of the general district rate or any other public fund or rate under its control in repayment of the said loan or any part thereof.—Attorney-General *v.* Tottenham Urban District Council, 73 J.P., 437.

Cases raising the same points as to unauthorised or irregular borrowing by local authorities are Rex *v.* Locke, *post*, p. 267, and Attorney-General *v.* Corporation of West Ham, *post*, p. 254.

SEDNAOUI ZARIFFA NAHAS AND CO., LIMITED, *v.* THE ANGLO-AUSTRIAN BANK.

1909. Reported in The Times, April 26th, 1909. Journal, Vol. XXX, p. 413.

Claim in Respect of the Dishonouring of Cheques.

The plaintiffs, who were a company carrying on a financial or banking business in Egypt, claimed £30,000 damages for an alleged breach of contract by the defendants in not paying two cheques dated June 28th, 1907, for £140 and £1,530 respectively, which were drawn by the plaintiffs on the defendant bank, and which were duly presented according to the statement of claim on July 9th. The plaintiffs alleged that the defendants had at the time of the presentation of the cheques moneys belonging to the plaintiffs in their hands sufficient to meet the cheques: that by reason of the dishonour of the cheques they had been injured in their credit and reputation in their business as bankers at Cairo, a run on the bank being caused thereby; that as a consequence a number of customers withdrew their accounts and securities from the plaintiffs' bank; that a number of banks withdrew their credits; that a number of advances were withdrawn; and also that the price of the shares in the plaintiff company fell heavily in consequence.

The defendants, by their defence, denied that they wrongfully dishonoured or refused to pay the cheques, or that they had at the time of presentation moneys of the plaintiffs in their hands sufficient to meet the cheques. They also denied that the plaintiffs had suffered the damage alleged.

Mr. Justice Pickford, in the course of his summing up, said the action was brought to recover damages for the dishonour of two cheques. When those cheques were presented the defendants gave this answer to each of the persons who presented them, "Effects not cleared; please present again." The defendants said they were justified in doing that, because they were advised of a number of cheques to be presented, and as they had not funds to meet them all they were entitled to meet none of them, but could ask the holders to present them again, and that they were entitled to do that until they were placed in funds to meet all the cheques. That, in his Lordship's opinion, was not the true position in law. The ordinary rule was stated quite accu-

rately by Sir John Paget in his book on Banking Law to be that a banker must honour his customer's cheques in the order in which they were presented; and his Lordship could see no reason why the same principle should not apply to a re-presentation. The defendants' manager did not deny that the general rule as so stated applied in ordinary circumstances, but he said that in the particular circumstances of this case he was entitled to depart from the ordinary practice, and honour none of the cheques till he had funds to meet them all, and he relied upon two circumstances—first, that two cheques drawn in favour of Martin's Bank and the London and Westminster Bank respectively were presented on the same day, and that he asked them to be presented again, as he did not wish to prefer one over the other; and, secondly, that at the material time there was a financial crisis in Egypt, and that that dispensed him from the obligation of acting upon the ordinary custom. His Lordship did not think that either of those reasons was sufficient in law. In his opinion a banker could not alter his obligations to his customer by any arrangement he liked to make with the holder of a cheque, and as to the point of there being a crisis, although possibly that might entitle a banker to alter his practice for his own protection, it did not alter his legal obligations. His Lordship thought, therefore, that so long as the defendants had assets in their hands they were bound to honour the plaintiffs' cheques to the extent of the assets. On July 6th, 8th, or 9th, 1907, the defendants ought to have honoured the first cheque that was presented to them which was within the amount of the assets in their hands. His Lordship thought the defendants had committed a breach of contract on July 6th, 8th, and 9th, and the question was what damages they should pay. If the jury thought the plaintiffs' credit had suffered from the dishonour of the cheques, it was unnecessary for them to prove that they had suffered any pecuniary damage in order that they might recover more than nominal damages. If the jury thought substantial injury had been done to the plaintiffs' credit they were entitled to give substantial damages. The plaintiffs said they had suffered pecuniary damage as the result of what the defendants had done. It was now conceded that if the defendants had acted in strict accordance with the law the plaintiffs must have had some cheque dishonoured, because on July 6th, 8th, and 9th there was either £1,860 standing to the credit of the plaintiffs or £1,660 according as a sum of £200, about which he would say something later, was or was not properly debited by the defendants to the plaintiffs, and there were being presented a cheque for £1,250 in favour of Martin's Bank, a cheque for £1,530 in favour of the London and Westminster Bank, and certain smaller cheques in favour of other persons. If the defendants had

honoured the £1,530 cheque they must have, or at least might have, dishonoured the £1,250 cheque. That had to be taken into consideration. The plaintiffs, who no doubt had considerable difficulties to contend with during the crisis—difficulties which they successfully surmounted—alleged that their credit had been injured by the action of the defendants in two ways—first, they said that various banks withdrew certain facilities by reason of the dishonour of the cheques; and, secondly, that various of their own customers withdrew their accounts. It was for the jury to say whether the evidence and the accounts which had been placed before them supported these allegations. As he had said, a question arose about a sum of £200 which the defendants claimed to debit the plaintiffs with. That arose in this way. There was a cheque for £200 drawn on the Anglo-Foreign Bank, which through a mistake was presented to the defendants, and through a mistake on their part paid by them. Had the matter stopped there his Lordship would have had no hesitation in saying that the defendants could not claim the benefit of that payment, but the defendants wrote to the plaintiffs saying that they had paid the £200 draft on them, and they received a reply from the plaintiffs acknowledging receipt of their letter, and stating that they had passed an entry in conformity. In those circumstances were the defendants justified in treating the sum of £200 as properly debited to the plaintiffs' account?

The jury found for the plaintiffs for £250.

Judgment accordingly.

BALE *v.* PARR'S BANK LIMITED.

1909. Reported. 25 Times L.R. 549. Journal, Vol. XXX, p. 415.

A Bank's Duty to Customers.

This was an action to recover £100 7s. 6d. alleged to be due by the defendant bank to the plaintiff as a customer.

The facts of this case are complicated and can only be deduced from the evidence and the statements of counsel.

It would appear that the plaintiff had an account with the Brondesbury branch of the defendant bank. He was a member of a syndicate of three, consisting of himself, Banks and Sutherst, formed for the purpose of developing a concession near Archangel. The plaintiff agreed to provide £350 for preliminary expenses, £100 of which was to be allotted to each member of the syndicate, and the balance of £50 kept in hand. The three members were proceeding to Russia. The plaintiff and Sutherst called at the plaintiff's bank, the plaintiff drew £350, £250 of which he handed to Sutherst, and £100 he himself kept. They all went to St. Petersburg, and when Sutherst returned to England, the plaintiff and Banks proceeded to Archangel. There Banks became in want of money and complained to the plaintiff that he had not received his £100. Plaintiff wrote to Sutherst in England on the subject. On the return of the plaintiff and Banks to St. Petersburg, the plaintiff received a telegram: "Call at Bank du Nord. Parr's Bank." On calling there, he was informed that they had £100 which had been cabled out for him. He took the money and gave a receipt. He gave Banks £55 in Russian money, and a rough post-dated cheque for the balance of £45, which he afterwards in England exchanged for a regular cheque for the same amount. He also advanced Banks £25. The plaintiff stated that he believed at the time that the money had come from Sutherst, that he had paid it into the plaintiff's account at the bank and got the bank to transmit it.

On reaching London, the plaintiff called at his bank and, casually asking for his pass-book, discovered that he had been debited with the £100. It was explained that Sutherst, after his return from St. Petersburg, and receipt of the plaintiff's letter, had written to and called at the Brondesbury branch of the defendant bank saying that the plaintiff would want more money in

Russia, and that it would be desirable for the bank to wire him £100 to the Bank du Nord, St. Petersburg, which the bank accordingly did, debiting the plaintiff's account therewith. The plaintiff had given no authority for their so doing, nor did Sutherst profess or suggest any such authority. Subsequently, Sutherst gave the plaintiff his I O U for the £100, and there was a conflict of evidence whether or not the plaintiff had informed the bank that, having received the I O U, the matter, so far as the bank was concerned, was at an end.

On behalf of the bank it was contended that judgment should be entered for them on the following grounds:—The plaintiff had already had the money at St. Petersburg. True, when he received it he did not know it was his own, but the payment was in fact made out of his account, and his ignorance was immaterial. The defendants had never represented that the money was that of any other person. Sutherst had acted as the plaintiff's agent, and, knowing the relations between the parties, the defendants were justified in treating Sutherst as a properly qualified agent. The money was paid by the defendants under a mistake of fact; they believed, in circumstances which justified their belief, that the plaintiff would want more money of his own at St. Petersburg. So, if the plaintiff had a right to recover the money, the defendants had a right to counterclaim for that which they had paid under mistake. Even if they were careless, that was immaterial. Further, the evidence showed that the plaintiff had been put on enquiry and had suspected the truth from the first. And when the plaintiff knew the whole of the facts he ratified what had taken place by taking the I O U from Sutherst.

Mr. Justice Lawrence delivered judgment. The question, he said, was whether the defendants could successfully claim to debit the plaintiff with this £100. It was admitted he gave them no authority to so debit him, but it was suggested that they were justified by the facts in doing so. It was alleged that the money had been paid under a mistake of fact, and that as the defendants could have recovered it on that ground in an action for money had and received they were entitled to debit the plaintiff with it now. It was the first time he had heard the defence of mistake of fact put forward in this way; the mistake here consisted in what the defendant's manager thought the plaintiff in Russia was thinking, but in general the words were used only with reference to facts which had happened or were supposed to have happened. The plaintiff, admittedly, had done nothing to induce the mistake, but it was said that this being the state of the manager's mind the defendants were entitled to recover the money paid. But it was unnecessary now to give a decision on the question of mistake and he would not deal with it further, for that defence here overlooked the special relation of banker and customer which

had existed between the parties; it regarded them as mere strangers. One of the essential terms of the contract between banker and customer was that the banker would not part with the customer's money without his authority; and here that term had admittedly been broken. The bank manager, who had given his evidence with propriety and fairness and had satisfied him as to his intelligence and fitness for the post he occupied, had frankly admitted that the only mistake made was the reliance on Sutherst's promise. His Lordship then stated the history of the case, and said it was contended that the taking of Sutherst's I O U and the giving of a new cheque for £45 to Banks at a later date amounted to a ratification of what had been done. No doubt after obtaining the I O U the plaintiff used language to the bank officials which they construed as meaning that he had accepted the I O U in relief of their liability. But by then the plaintiff had found out that Sutherst was an undischarged bankrupt, and it was extremely improbable that anyone who was not a mere baby in business would accept the I O U of an undischarged bankrupt instead of the credit of an institution like Parr's Bank. Besides, the plaintiff was to get nothing for releasing the bank. He therefore thought that though the bank officials had given their evidence with every desire to confine themselves to what was true, their construction of the plaintiff's language was wrong. The giving of the new cheque for £45 did not affect the case. The plaintiff had received the money in St. Petersburg, thinking that he was merely Sutherst's agent to pay it to Banks. He first handed it all to Banks, and then, as Banks said he did not want to carry so much money about with him he let Banks give him back £45 and gave Banks a cheque for it on a rough piece of paper there and then, and after he got back to England he gave a cheque for £45 in proper form in exchange for the old one. He regarded the money throughout as Banks's money and he could not honourably have acted otherwise than he did. The bank manager, his Lordship wished to repeat, had acted in entire good faith; he had shown a consideration for his customer in a way which was unusual, but he had done so in the belief that before the customer received the money he would know it was his own. The manager had relied on Sutherst, and Sutherst had, no doubt, been very plausible and had promised to cable the plaintiff the whole of the facts, and this had led to all the trouble. There must be judgment for the plaintiff with costs.

Judgment accordingly.

[SUPREME COURT OF THE TRANSVAAL.]

THE NATIONAL BANK OF SOUTH AFRICA, LTD., *v.* PATERSON.

1909. Transvaal L.R., 1909. Part II, p. 322. Journal, Vol. XXX, p. 422.

Personation of Payee—Forging Payee's Name on Cheque—No Protection to paying Banker.

This judgment, being a Colonial one, is, of course, not a binding authority on an English Court. It is included here as a valuable expression of judicial opinion on a point which has never been before a Court in this country. It will be noticed that the terms of the Colonial enactment on which it turned are identical with those of sec. 60 of the Bills of Exchange Act.

In this case His Lordship the Chief Justice delivered the following judgment:—The question raised is of considerable importance in connection with banking practice. A draft of £20 was drawn by the Royal Bank of Scotland on the appellant bank in favour of the respondent or his order, and forwarded by letter to a friend of respondent. The friend, named Cook, received the letter, opened it, took out the draft, presented it for payment at the bank, said he was Paterson, forged the signature of the latter on the back of the bill above the office stamp of Dacre Tottenham and Co., and received the money, which he appropriated to his own use. Neither Cook nor Paterson were customers of the bank. Respondent brought action for the amount of the draft, and was met by the plea that the instrument had been paid in due course. The Magistrate, however, found for the plaintiff and the bank appealed. The general rule is that payment to the wrong person is not a fulfilment of the mandate. There are exceptions, however, and the bank founds its contention in this instance on the provisions of sec. 58 of the Bills of Exchange Proclamation.* They are to the following effect:—"When a bill payable to order on demand is drawn on a banker and the banker pays it in good faith, and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee, or any subsequent endorse-

* *Cf.* Bills of Exchange Act, sec. 60.

ment, was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority." The section is not very clearly worded, but it is obvious that it cannot refer to all bills which are paid by a banker in good faith and in the ordinary course of business and on the back of which the name of the payee has been written, otherwise the words in the section from "it is not incumbent" to "purports to be" would be meaningless. It protects the banker only when the bill had been negotiated by endorsement when he had in good faith and in the ordinary course of business paid a bill into the hands of a person whose title to it purported to be derived through a prior endorsement, whether that endorsement was in fact genuine or not. If this conclusion is correct, then it is clear that the transaction before us was not one which fell under protection of the section. There was no endorsement on the bill when he brought it to the bank, because it is common cause that the office stamp had not that effect. It was intended to serve for purposes of identification only.

A consideration of the sense in which the word "endorsement" is used in the section seems to me also to lead to the conclusion that the present matter does not fall within its provisions. As applied to negotiable instruments the term is capable of three meanings. In a general sense every signature written on the back of such an instrument is an endorsement; even if only placed there for the purposes of identification or as a receipt; that is the literal meaning of the word. Its ordinary legal meaning is the signing of a name on the back of an instrument *animo indorsandi* (if one may be permitted to use such a phrase); that is with the intention of undertaking the well-understood liabilities of an endorser. And there is a third meaning, which limits the term to an endorsement in the last-named sense followed by delivery of the document. It is important to note that the first section of our Bills of Exchange Proclamation defines endorsement as meaning "endorsement completed by delivery." Now I am quite clear that the word endorsement was used in sec. 58 in the legal or technical sense, because an endorsement made, not *animo indorsandi*, but for the purpose of identifying the person who actually received the money, could have no legal consequences beyond those which would follow the signing of an ordinary receipt. And the use of the word in that sense is quite incompatible with the general frame of the section. In my opinion the writing of the name Paterson upon the back of this bill by Cook did not purport to be an endorsement in the legal sense. When a bill payable on demand or a cheque is drawn in favour of "X or his order" "or to the order of X" (the two

expressions are identical, see Procl. 11, 1902, sec. 6-5) then the mandate to the banker is expressed in the alternative. He must pay X, or he must pay the person whom X in due and proper form orders him to pay. But he cannot insist upon X ordering him to pay someone else. If X presents the bill himself the banker must pay him; if he is not certain of his identity he may demand proof of it, and may claim a reasonable time within which to satisfy himself, but having done that he must pay, or take the responsibility of declining to discharge the mandate. No doubt the habit of bankers is in such a case to obtain the signature of X on the back of the bill before paying it; but it is difficult to see how they can be entitled to demand anything more than a receipt (see "Paget on Banking," 2nd edit., p. 46). And when the signature is given it cannot have the effect of a legal endorsement, because there can be no intention to incur the legal liabilities of an endorser; the bill has come home and is being paid. Of this nature was the so-called "endorsement" on the draft in the present instance, and though it was undoubtedly forged, that fact cannot bring the transaction within the operation of sec. 58 of the statute.

His Lordship the Chief Justice then dealt briefly with the English authorities on the subject. There was a remarkable dearth of authorities on the point. No South African case much in point could be referred to; as far as one knows the question has never been actually decided by a Court of law.

As regards the other contention raised on behalf of appellant, viz., that respondent had, by his negligence, prevented himself from recovering, the Court failed to see that Paterson was guilty of any negligence. Cook had wired to respondent that the draft had arrived, and no one could have suspected that the man who had wired would straightway proceed to forge the payee's signature and cash the draft.

The appeal therefore fails and must be dismissed with costs.

Appeal dismissed.

Note.—As to "*animus indorsandi*," see Lloyd *v.* Howard, 15 Q.B., at p. 1000. It appears doubtful whether the banker could effectively demand the signature of the payee, even as a receipt. Refusal to give a receipt affords no ground for withholding payment. *Cf.* "Leake on Contracts," p. 746. As a receipt, the name of the payee written on a cheque is exempt from stamp duty under sec. 9 of the Finance Act, 1895. Sec. 103 of the Stamp Act, 1891, imposes a penalty on refusal to give a receipt duly stamped only "in any case where a receipt would be liable to duty," which, as shown above, is not the case here.

[IN THE COURT OF APPEAL.]

THE BANK OF AFRICA, LIMITED, *v.* COHEN.

1909. Reported. [1909] 2 Ch. 129. Journal, Vol. XXX, p. 571.

Wife as Surety for Husband.

This was an appeal from a decision of Mr. Justice Eve. The action was for specific performance of an agreement by the defendant, Helen Cohen, to mortgage or transfer to the plaintiffs property in the Transvaal as security for advances made by the plaintiffs to her husband, and for an injunction to restrain the defendant from taking proceedings in the Transvaal to recover from the plaintiffs the possession of documents relating to her title to the property. It appeared that the plaintiffs were bankers in London and the Transvaal and the defendant was the wife of Louis Woolf Cohen. In November, 1903, Mr. Cohen was indebted to the plaintiffs for advances of money and was desirous of obtaining further advances. The plaintiffs were then holding in safe custody for the defendant the documents relating to the property. By agreement of November 23rd, 1903, the defendant agreed to give to the plaintiffs as security for the advances two mortgage bonds to be charged upon certain real property in Johannesburg registered in the defendant's name. The plaintiffs subsequently made further advances to Mr. Cohen. On December 4th, 1906, the defendant appointed the plaintiff's manager to be her attorney to mortgage or transfer the property to the plaintiffs. On November 2nd, 1907, Mr. Cohen was indebted to the plaintiffs in respect of the advances in the sum of £6,538 19s. 1d., for which the plaintiffs had obtained judgment. The defendant counterclaimed that the two documents of November 23rd, 1903, and December 4th, 1906, were void as against her. It was contended on behalf of the defendant that the documents were invalid on two grounds:—(1) That the defendant being a married woman was incapacitated by the law of the Transvaal from entering into the transactions; and (2) that she executed the documents under the influence of her husband without independent advice, and was not aware that they were agreements to secure the indebtedness of her husband to the bank.

Mr. Justice Eve held that the defendant's capacity to con-

tract was governed by the *lex situs;* that by that law the defendant as a married woman was incapacitated from entering into such a contract unless the benefits of doing so were specifically explained to her, and that as upon the evidence his Lordship was satisfied that the benefits of entering into the contract were not explained to the defendant, the agreement of November, 1903, was void, and the plaintiffs' action therefore failed. His Lordship also ordered the bank to deliver up the documents, but gave the defendant no costs.

The plaintiffs appealed.

The Court dismissed the appeal.

The Master of the Rolls said he agreed with the judgments read by the Lords Justices.

Lord Justice Buckley read the following judgment:—The first question in this case is, whether the bank can, by way of specific performance, clothe themselves with the character of mortgagees of the land in Johannesburg. Upon this question the relevant instrument is the bond dated December 4th, 1906, by which the defendant declares that she renounces in favour of the bank the benefit of all rights whatsoever which the laws of the Transvaal grant her in relation to the land. If this instrument be carefully scrutinised it will be found that its whole operation and effect is to appoint an attorney to charge, mortgage or transfer the land, and for that purpose to execute the necessary instruments and to appear before the Registrar of Deeds and make declarations of value, acknowledgment of indebtedness and so on, and to take all steps necessary for recording and registering the same. The grantor is to incur no personal liability, and the acts which the attorney is empowered to do are exclusively acts relating to the land. The relevant law of the Transvaal is in this Court question of fact. The learned Judge has found the fact and I agree with him in his finding. The substance of it is that he finds that unless and until a married woman who does not fall within certain exceptions has gone through certain formalities she was and is under the Roman Dutch law incapacitated and incapable of entering into a contract of suretyship for her husband. I may expand that statement of the law and state my own view as follows:—A married woman's contract of suretyship for her husband cannot be described (in terms familiar in our own law) as being either void or voidable. It must be stated, I think, in the form that she has a contingent capacity to become bound by such a contract. Thus, if she holds a particular character, that of a trader, or if she receives a pecuniary benefit from the contract (a matter which may have to be ascertained *ex post facto*), or if, after explicit explanation of the exact nature of her rights, she formally

renounces the *Senatus Consultum Velleianum* and the *Authentica si qua mulier* she may be bound by such a contract. But unless and until some one of those conditions is satisfied the contingency upon which she becomes capable has not happened and she remains incapable of becoming bound by the contract. A renunciation in general terms such as those in the power of attorney of December 4th, 1906, is not sufficient. She must renounce explicitly. If the true effect of the evidence is that she must renounce before the contract is entered into, specific performance is on that ground impossible, for the lady did not renounce before execution. If, on the other hand, renunciation before the contract is entered into is not essential, still the conditions under which the defendant would have become capable of contracting have not been satisfied, with the result, I think, that the contract, as one dealing with an immovable in the Transvaal, is not and cannot by way of specific performance be rendered binding upon her. We were pressed with *Ex parte* Pollard (Mont. and Chitty, 239). That was a case in which there was no incapacity. The mortgagor was *capax* and had purported to mortgage the land, but according to the *lex situs* his mortgage was ineffectual. The land therefore was not bound. The mortgagor had power to mortgage, had contracted to mortgage, but had not mortgaged. According even to Scotch law, however, his contract to mortgage could have been enforced *in personam* although his mortgage had no effect *in rem*. What was held was that under those circumstances the property came into the hands of the assignees of the intending mortgagor charged with the equity contained in the contract. That is a decision which has no application where there is not capacity. A judgment for specific performance here would mean that this Court should order the defendant, after having had her rights explained to her, to renounce the *Senatus Consultum Velleianum* and *Authentica si qua mulier*, whereas the law to be applied is that the wife, after explanation of her rights, may refuse to renounce them. Specific performance in that sense is, in my judgment, impossible. Mr. Dicey's language ("Conflict of Laws," at page 517) I think is correct, that a person's capacity to make a contract with regard to an immovable is governed by the *Lex situs*. The second question is whether the defendant is liable in damages. Here it is necessary to consider also the bond of November 23rd, 1903. That bond did not exclude personal liability. The power in that case extended to allow the attorney to acknowledge the grantor's indebtedness to the bank in such sum as the attorney might fix. It seems to me, however, that that was superseded by the provision in the bond of 1906, which excluded personal liability. This question, therefore, again seems to me to fall to be determined only upon the bond of 1906. Here the question is as to liability in damages

for breach of a contract relating wholly to acts to be done with reference to land in the Transvaal, acts which, if the previous portion of this judgment is right, were not done because the grantor was not capable of doing them. Here again the question is governed by absence of capacity. There can be no right to damages for not performing a promise to do an act, which promise was not made because the promisor could not make it. The third question is whether the bank are entitled to keep the deeds in right of a mere possessory lien. I think not. Upon the facts the deeds came into the possession of the bank for purposes of safe custody. When the alleged security was given they dealt with the deeds in a way in which they would have been entitled to deal with them if they were mortgagees, but if they are not mortgagees they hold them simply under the original contract by which they were lodged for safe custody. There was no fresh delivery of the deeds by the defendant on the terms that whether there was a mortgage or not upon the land the bank should have a possessory right to the deeds. In negativing the right of the bank to be mortgagees it seems to me to follow that they have no right to possession of the parchments, and to retain those as against the person who has lodged them with the bank. Upon all three points, therefore, the appellants in my judgment fail, and the appeal must, I think, be dismissed with costs.

Lord Justice Kennedy also read a judgment dismissing the appeal.

Appeal dismissed.

HOLLAND *v.* MANCHESTER AND LIVERPOOL DISTRICT BANKING CO., LIMITED.

1909. Reported. 25 Times L.R. 386.

Pass-book—Apparent Credit Balance due to Mistake—Cheque drawn against such ostensible Balance—Ultimate Rectification.

The plaintiff, a customer of the defendant bank, finding on examining his pass-book that it showed a balance of £70 17s. 9d. in his favour, drew a cheque for £67 11s. in favour of a firm to whom he owed that amount. On the cheque being presented by that firm it was dishonoured by the defendants, whereby the plaintiff suffered damage in respect of which he sued the defendants. It appeared in evidence that at the time the plaintiff drew the cheque for £67 11s. he had a balance at the bank of £60 5s. 9d. only, but that in his pass-book one of the bank clerks had, in error, entered to the plaintiff's credit a sum of £10 12s. twice, with the result that from the pass-book the plaintiff appeared to be in credit to the amount of £70 17s. 9d.

Held, that although the defendants were entitled to have the wrong entry ultimately corrected, the plaintiff (who had not been guilty of any negligence or fraud in connection with the matter) was entitled, until that correction had been made, to act upon the defendants' statements in the pass-book; and that, having acted upon those statements and suffered damage thereby, he was entitled to recover against the defendants the amount of such damage. . . . ."

The Lord Chief Justice, in giving judgment, said that the case was of the greatest importance, and but for the pressure of business at the assizes he should have taken time to consider his decision. Owing to that pressure, however, and to the fact that in any event the case might go to the Court of Appeal, he would deal with the matter at once to the best of his ability. He considered that the plaintiff had told the truth in his evidence and he did not think that the plaintiff was negligent in the discharge of any duty he owed to the bank, or that he was guilty of any fraud. The effect of a pass-book entry did not seem to have been clearly decided in the Courts, but he considered that, whilst

the bank in this case were entitled to have any wrong entry ultimately corrected, until the correction was made, the customer had the right to act upon the bank's statements in the pass-book, and to receive them as statements by the bank that there was so much money to his credit. The pass-book in all cases, although subject to adjustment, was *primâ facie* evidence against the bank of the amount standing to the credit of a customer, upon which that customer, in the absence of negligence or fraud on his part, was entitled to rely. He was supported in this view by the judgment of Lord Campbell, L.-C., in Commercial Bank of Scotland *v.* Rhind, 3 Macq, H.L., 643. He therefore held that the plaintiff in this case was entitled to recover and judgment must be entered in his favour for £100 and costs.

Note.—The right of the bank ultimately to debit the plaintiff with the £10 12s. was not actually in question in this case. Inasmuch as he had altered his position in reliance on the balance shown, Lord Alverstone's *dictum* seems somewhat inconsistent with the case of Skyring *v.* Greenwood, 4 B. and C., 281.

[IN THE COURT OF APPEAL.]

PERRY *v.* NATIONAL PROVINCIAL BANK OF ENGLAND LTD.

1910. Reported. [1910] 1 Ch. 464.

Principal and Surety—Release of principal Debtor—Discharge of Surety.

In 1903 P mortgaged certain property to the bank to secure the overdraft of P Brothers, a firm in which he was not a partner. The mortgage deeds all contained a provision that the bank should be at liberty without affecting their rights under the mortgages (among other things) to vary, exchange, or release any other securities held or to be held by the bank for or on account of the moneys thereby secured or any part thereof . . . . and to compound with, give time for payment of, and accept compositions from, and make any arrangements with the debtors or any of them.

In 1908, P Brothers being insolvent, a scheme was arranged whereby a company was formed to take over certain properties of the firm and to issue debentures to the creditors in full discharge of their debts. The bank, in accordance with the arrangement, applied for debenture stock on a form which contained an express agreement by the applicants to accept such debenture stock in full discharge of their claims against P Brothers. The amount of the debt in respect of which the bank applied for debenture stock was £1,900, arrived at by valuing the securities held by them on the property of the firm and deducting such value from the total debt; no deduction was made on account of P's mortgages. The bank having threatened to sell the property comprised in P's mortgages, P brought an action claiming a re-conveyance of the mortgaged property on the footing that nothing was due on the mortgage.

Held, by the Court of Appeal, varying the decision of Neville, J., that as to the £1,900, the debt was completely discharged, and therefore P's property was released; but that as to £1,630, the debt remained unpaid, although the principal debtor was released, consequently that by the terms of the mortgage deed, P's property remained liable.

Cozens Hardy, M.R.: The first point which arises is this. The plaintiff, the surety, says that the debt is released. "You, the bank," he says, "have no claim upon my property. You, the bank, therefore, must hand over my deeds to me because there is no longer any liability on me as surety." Neville, J., has accepted that view, and the bank appeal here. In my opinion there are here two perfectly distinct and independent points. It seems to me plain that by this transaction, under which the bank accepted these debentures and 25 per cent. bonus in accord and satisfaction of £1,900, part of the debt, that part of the debt was gone just as much as if it had been paid in sovereigns to the bank, and that in no point of view can the bank be entitled to claim against the surety any part of that £1,900. That, however, does not deal with the whole of the matter. It leaves £1,630, as to which questions of difficulty and importance arise. What was the position of the bank with respect to that £1,630? It is quite plain to my mind that they were mortgagees, and only mortgagees, in respect of the property which they valued at £1,630. It is quite plain that the equity of redemption in that mortgaged property did not remain in Perry Brothers, but passed to the company, and I see no ground whatever for holding that that which was once a mortgage has become by any transaction proved before us anything else than a mortgage. The position is this: £1,630, part of the original debt due on Perry Brothers' account, is still unpaid, and for that balance there is a security held by the bank. That gives rise to the important point which has been argued before us. It is said, "Even if that be so, still there can be no right as against the surety, because by reason of this arrangement with Perry Brothers you have released Perry Brothers, and there can be no suretyship after the release of the principal debtor." But I think the answer to that is that it is perfectly possible for a surety to contract with a creditor in the suretyship instrument that notwithstanding any composition, release, or arrangement, the surety shall remain liable although the principal does not.

In these circumstances I cannot agree with Mr. Hughes in his able argument that there was any obligation whatever upon the bank in accepting this arrangement to reserve any rights against the surety. The surety had himself contracted that the rights under the deed should not be affected by any such arrangement; and, that being so, it seems to me that though there is no personal liability on the part of Perry Brothers to the bank, yet as regards this £1,630, this is part of the liability of Perry Brothers secured by the mortgage and is within the meaning of the deed something for which the surety is still liable to the bank notwithstanding the release of the debtor. For these reasons, with great respect to Neville, J., I think that his order must be

varied, in substance, by declaring that the plaintiff is entitled to have back his deeds only upon payment to the bank of so much of £1,630 as has not been discharged by the realisation of the securities held by the bank on the property of the firm.

Fletcher Moulton, L.J., and Buckley, L.J., agreed.

The surety elected to redeem, and an order for redemption was made on the footing above set forth.

Re A. BOYNTON, LIMITED,—HOFFMAN *v.* A. BOYNTON, LIMITED.

1910. Reported in The Times, Feb. 14th, 1910. Journal, Vol. XXXI, p. 199.

Priority between Debenture-holders' Costs, Receiver's Remuneration, and Bank's Charge—Liability of Receiver.

This was the further consideration of a debenture-holders' action.

The Company was engaged in the business of an hotelkeeper and occupied a leasehold house, Nos. 16 and 17, St. James Place. The writ in the action was issued on April 3rd, 1908, and on April 14th, 1908, judgment was pronounced and Mr. Lionel Henry Lemon was appointed receiver and manager. He carried on the business for rather less than a year and made some profits by trading. Ultimately, however, he became unable to pay the rent, the lessors by leave of the Court distrained and seized the stock, furniture, etc., and on March 5th, 1909, leave was given to the receiver to give up possession. There was a fund in Court of about £600 representing the net result of the collection of the company's debts and the carrying on of the business by the receiver. Meanwhile, on April 14th, 1908, application was made by the plaintiff that the receiver and manager might be at liberty to borrow £500 and that the same might be a first charge on the assets covered by the debentures. Leave was given the same day. The receiver thereupon applied to Lloyds Bank for the loan. They caused a valuation of the furniture and other effects to be made and they appeared to be of the value of over £3,000. They thereupon made the advance on the security of a charge dated May 5th, 1908. This document, so far as material, was in the following terms:—"This indenture made May 5th, 1908, between Lionel Henry Lemon, hereinafter called the receiver, of the one part, and Lloyds Bank, hereinafter called 'the Bank,' of the other part. Whereas by an order of the Chancery Division of the High Court dated April 14th, 1908, the receiver was appointed receiver on behalf of the plaintiff and the other debenture-holders of the company of all the property and assets of the company (except uncalled capital) comprised in or subject to the securities and charges created by the debentures issued by the company to the plaintiff and the other debenture-holders and to

receive the rents and profits of the leasehold premises known as The Boynton's Hotel, 16 and 17, St. James Place, St. James. And whereas upon the application of the plaintiff that the receiver might be at liberty to borrow £500 and the same be a first charge on the assets covered by the debentures leave was on April 14th, 1908, given to the receiver to borrow a sum or sums not exceeding £500 at a rate of interest not exceeding 6 per cent. And whereas the bank, at the request of the receiver made with such leave as aforesaid, have agreed to lend to the receiver the sum of £500 upon having the repayment thereof with interest secured in manner hereinafter appearing. Now this indenture witnesseth that in pursuance of the said agreement and in accordance with the leave so given as aforesaid, and in consideration of the sum of £500 paid by the bank to the receiver, the receiver as trustee hereby charges all the property and assets of the said A. Boynton, Limited (except uncalled capital), comprised in the said debentures so issued by the said A. Boynton, Limited as aforesaid with the repayment on demand to the bank of the said sum of £500 together with interest thereon at the rate of £5 per cent. per annum to the intent that the charge hereby created shall be a first charge upon the said property and assets and in priority to all the debentures so issued by the said A. Boynton, Limited." The indenture was executed by the receiver, but it contained no expression of personal obligation on the part of the receiver to repay the money. By an order of March 22nd, 1909, made upon the application of the bank to realise their security, it was "ordered that the applicants be at liberty to attend the proceedings on the footing that as from the date of the order they should be in the same position as if they had brought an action with the leave of the Court to realise their security and had obtained the appointment of the present receiver as their receiver."

The proceedings did not result in realising enough to pay in full the plaintiff's costs of the action, the receiver's remuneration, and the amount advanced by the bank. The debenture-holders claimed that their costs and the receiver's remuneration ought to be paid first, and the balance only paid to Lloyds Bank in part discharge of their loan. The bank contended that the only charges which should come before them were the costs of realisation and the remuneration of the receiver for the short period during which he had acted or must be treated as their receiver under the above-mentioned order of Court.

In delivering judgment, Warrington, J., said as follows: –

Under these circumstances Lloyds Bank put forward the claim as to priority of payment above mentioned. They contend that they are creditors of the receiver in respect of a debt properly incurred by him; that he is entitled to indemnity out of the

assets before any costs other than those of realisation in the strict sense are paid; that under the principle of subrogation they are entitled to the benefit of his right of indemnity; and that he must pay his debts before he can take his remuneration.

The claim thus put forward by Lloyds Bank depends in my judgment on the assumption that the receiver is personally liable to them for the £500, because, unless he is so liable, he has no right of indemnity, and there would be nothing to which the principle of subrogation could apply. Is this assumption well founded? It is true there is no express exclusion of the personal liability; but this is not conclusive if the right inference to draw from the transaction is that he did not intend to pledge his personal credit and the bank did not rely upon it. I think this is the right inference to draw. I should not hesitate to draw that inference from the nature of the transaction alone, and this view is supported by the judgment of Lord Justice Cozens-Hardy in *In re* Glasdir Copper Mines, Limited, 1906, 1 Ch., at p. 384. The Lord Justice said: "Apart from authority, I think there is great force in the argument that when the Court has taken the administration of an undertaking into its own hands by means of an officer appointed to manage the undertaking, and finds it proper to procure money in order that the undertaking may be preserved or carried on to greater advantage with a view to ultimate realisation, it can make no difference whether the person who finds the money is an outsider or is a party to the action." And then comes the important part:— "No personal liability to repay is contemplated in either case. The lender gets only a charge on the undertaking; and I doubt whether he can, by virtue of such a charge, stop the business. My impression is that his only right is to have repayment out of the proceeds of the undertaking as and when realised. And it might well be held that any person advancing money under these circumstances could not deprive the officer of the Court of his proper demand for work done and services rendered in the course of the carrying on and winding-up of the business." There is a certain qualification of that which I will refer to later. The Lord Justice's remarks as to personal liability are general in terms and were, I think, intended to be so. In the present case the recitals in the charge and the terms of the charge itself indicate that the bank were content to look to their security, and to that alone. The claim of the bank, therefore, to be treated as creditors of the receiver and entitled to the benefit of his right of indemnity fails.

What, then, is their position? They come in and take a charge upon the assets of a business which is in course of realisation by the Court, and in my opinion they can take in satisfaction of their charge no more than that which is actually realised. The

plaintiff has incurred his costs of the action, and the receiver has given his services, in the endeavour to realise as large a fund as possible for the benefit of the several persons having charges on it, and I think they are both entitled to be indemnified before the fund is applied in payment of these charges. The principle of *In re* New Zealand Midland Railway Company, 1901, 2 Ch., 357, in my opinion, applies, as does the latter part of the passage of the judgment of Lord Justice Cozens-Hardy read above. I think, therefore, that the plaintiff's costs of action as between solicitor and client and the remuneration of the receiver must first be paid, and the balance of the fund will be paid to the bank in part discharge of their debt.

The Judge then proceeded to deal with the qualification to which he had previously referred. Based on the case of Strapp *v.* Bull, 1895, 2 Ch., 1, a distinction is drawn between mere strangers, outside creditors, such as independent bankers advancing money from the outside and those who by taking a formal charge on the assets for their advances, come to occupy the position of debenture-holders or a position analogous thereto. In the former case, the claim would rank in priority to debenture-holders and receivers and managers, in the latter, the remuneration of the receiver and manager would take precedence. Holding that in the present case, the bank came within the second category, his Lordship decided, as above stated, that the plaintiff's costs of action as between solicitor and client and the remuneration of the receiver must first be paid and the balance of the fund paid to the bank in part discharge of their debt.

Judgment accordingly.

Note.—On the question of the personal liability of the receiver and manager this case supersedes that of National Provincial Bank of England, Ltd., *v.* Basden, *ante*, p. 79, being more in accordance with the above-quoted opinion of Cozens-Hardy, L.J. The presumption must be taken to be against such personal liability, and it is therefore desirable, wherever possible, that a bank in making such a loan should expressly stipulate for the personal liability of the receiver, in addition to the charge on the property of the company.

[IN THE COURT OF APPEAL.]

DEELEY *v.* LLOYDS BANK LTD.

1910. Reported. [1910] 1 Ch. 648.

Mortgage to secure Current Account at Bank—Subsequent Mortgage to another Party—Current Account continued—Appropriation of Payments—Rule in Clayton's Case.

In September, 1893, John Glaze executed a mortgage of certain property to the bank. The mortgage contained a covenant by Glaze that he would pay on demand, or if no demand were made in his lifetime, that his representatives would pay on his death, to the bank the balance then owing from the mortgagor on his current account with the bank, with interest and charges. The deed contained a proviso that the amount to be secured thereby should not exceed £2,500. It was made subject to a first mortgage for £2,500 which was afterwards transferred to the bank, who also held other security for John Glaze's overdraft to the amount of £1,000.

By a third mortgage, dated October 19th, 1895, but not in fact executed till December 2nd of that year, John Glaze mortgaged the same property, together with other property, to his sister, Mrs. Deeley, to secure £3,500 expressed to be advanced by her. It was made subject to the first and second mortgages, reciting the mortgage to the bank and stating that there was due to the bank on this security £3,586, not mentioning the limit of £2,500.

The Judge at the trial held that, on the evidence, the bank had notice of this mortgage on December 2nd, 1895.

The bank did not follow the usual practice of drawing a line and opening a fresh account on receipt of this notice, but continued Glaze's current account without any break.

Glaze from time to time paid moneys in to his account, and if the rule in Clayton's case had been held to apply these sums would have cleared off the amount due on the first mortgage at the date of the notice of the second mortgage by about January 6th. Some of the moneys were, however, paid in for the purpose of meeting particular bills or cheques, and the residue was drawn out by other cheques or payments made on Glaze's behalf. The

bank always refused to make further advances to Glaze or let him overdraw beyond the limit of £3,500 for which they held security, except on deposit of fresh security for a temporary advance. The plaintiff's own mortgage was on one, if not two, occasions lodged with the bank as such security, presumably with her consent.

The plaintiff's husband, Mr. Deeley, took an active part in arranging such further overdrafts for John Glaze. In April, 1899, John Glaze became insolvent. The bank having, as before stated, taken a transfer of the first mortgage, entered into possession of the property, and sold it for £5,500, which, with expenses, was just sufficient to pay what was due on the two mortgages. No complaint was made of the sale at the time, and the plaintiff's husband obtained from the bank a release of a guarantee given to them by Thomas Glaze, a brother of John Glaze, for the moneys secured by the mortgage, on the ground that the bank had been paid out of the moneys received on the sale, and obtained from Thomas Glaze a release of a sub-guarantee given to him by the plaintiff for part of the amount.

It was held that the plaintiff, through her husband, had notice of all the dealings between John Glaze and the bank.

This action was brought in 1905 by Mrs. Deeley, claiming accounts as against a mortgagee in possession, on the footing that the bank were not entitled to charge for advances made by them to John Glaze after notice of the plaintiff's mortgage, the contention being that the overdraft at the date of the second mortgage had been wiped out by subsequent transactions.

Eve, J., dismissed the action.

The plaintiff appealed.

The only question argued on the appeal was whether the mortgage to the bank had been discharged by the rule in Clayton's case, 1 Mer. 572.

The Court of Appeal, by a majority, Moulton and Buckley, L.JJ., Cozens-Hardy, M.R., dissenting, dismissed the appeal.

Cozens-Hardy, M.R., held that under the rule in Clayton's case the payments in must be attributed to the pre-existing debt, and there were no circumstances proved in the case sufficient to rebut the presumption of such appropriation, or estop the plaintiff from asserting it. He based his judgment largely on the decision of the House of Lords in London and County Banking Company *v.* Ratcliffe,, 6 Ap. Cas., 722.

Fletcher Moulton, L.J., after stating the facts, said:—The argument in support of the plaintiff's claim is as follows:—It is contended that under the doctrine laid down in the case of Hopkinson *v.* Rolt, 9 H. of L. C., 514, the mortgage to the bank can only give a charge in favour of advances made prior

to December 2nd, 1895, and that by reason of the rule laid down in Clayton's case, 1 Mer. 572, the payments into the bank after the date of that notice must be taken as being applied to the discharge of the earliest items on the debit side. If this reasoning be sound, it follows that by the mere activity of the account the whole of the debit items of a date earlier than December 2nd were paid off before January 6th of the next year, and therefore by that date the mortgage to Mrs. Deeley had acquired priority over the mortgage to the bank. It is difficult to imagine anything more directly contrary to the intention of every one of the parties taking part in the transactions in question as evidenced by their conduct at the time and subsequently. But, of course, everyone is presumed to intend the legal consequences of his actions, and it is possible that a result so unjust and so unexpected might be a consequence of the actions of the parties. I am glad, however, to be able to come to the conclusion that this is not so. The plaintiff's contention is, in my opinion, unsound, and is based on a total disregard of the special circumstances of the case. To make clear the reasoning by which I have come to this conclusion, however, it will be necessary for me to deal more specifically with the language of the two mortgages and the circumstances under which they were given.

His Lordship recited the terms of the mortgages to the bank and the plaintiff and stated the effect of the former as follows:—"To put it shortly, the mortgage is given to secure the account current to the extent of £2,500." I have not the slightest doubt in my own mind, he continued, that no one of the parties concerned in the mortgage of October 19th, 1895, had any intention of affecting the position of the bank in any way whatever, or had any idea that the execution of that mortgage could have any such effect. In this matter, as in all others, Mrs. Deeley was entirely in the hands of her husband, who, so far as I can see, voluntarily and spontaneously arranged to get her this so-called security, and after the evidence that was given both by Mr. and Mrs. Deeley at the trial I have no doubt that we are bound on all questions of knowledge, consent, and intention to take him as representing her in connection with the business. Both Mr. Deeley (on his own account, and as representing his wife) and Mr. Glaze had the strongest interest in keeping the relations with the bank uninterfered with. To have allowed the security held by the bank to be interfered with would have been fatal to their plans, as is admitted by Mr. Deeley, and is also abundantly clear from the documents in the case. The bank was at the time steadily refusing, and continued afterwards steadily to refuse, to allow to Mr. Glaze an overdraft beyond the amount of the security held by them. They could not, therefore,

have intended to do anything which would lessen or weaken that security. There is nothing in the giving of the mortgage to Mrs. Deeley which would be understood by any of the parties to conflict with this. The bank had no interest in any margin there might be in the value of the property beyond their charge on it, and it was undoubtedly believed by Mr. Glaze and Mr. and Mrs. Deeley to be of considerably greater value than the charges upon it. It was not unnatural, therefore, that they should think that by giving to Mrs. Deeley a charge upon that margin they were not in any way interfering with the rights of the bank. The language of the indenture itself is quite consistent with this interpretation, for it expressly states the charge to Mrs. Deeley to be subject to the bank and the principal moneys and interest payable thereunder. I am satisfied, therefore, that both Mr. Glaze and Mr. Deeley, as representing his wife, understood and intended the charge of £2,500 to remain a continuing charge in priority to the mortgage to Mrs. Deeley to secure to that extent the balance of Mr. Glaze's account, not only at the moment but in the future; and in his cross-examination he admitted that in all his transactions with the bank on behalf of Mr. Glaze he took this to be the case and knew that the bank also so considered it.

But although I am satisfied that the intention of the parties was to do nothing which could possibly interfere with the arrangements with the bank as to the account continuing to be secured by their mortgage to the extent of £2,500, and although there is nothing in the language of the mortgage inconsistent with that intention, it would, in view of the decided cases, be unsafe to give this interpretation to the language of the mortgage to Mrs. Deeley so as to attribute to it this effect by virtue of its terms alone and without regard to other circumstances. The case of Hopkinson *v.* Rolt lays down clearly that where there exists a mortgage for past and future advances the mortgaged property still belongs to the mortgagor at each moment subject to the advances then made, and that a second mortgage is such a disposition of the property at the moment in the mortgagor that after notice of it has been given to the first mortgagee it takes precedence of subsequent advances under the earlier mortgage. Comparing the form of the mortgages in this case with those in Hopkinson *v.* Rolt and Ratcliffe's case, I cannot see any such substantial difference in language as would prevent the application of the law there laid down if the circumstances of the case were such as there existed and with regard to which that decision was given. But the circumstances in this case present differences of a fundamental character, and we must examine carefully the grounds of these decisions in order rightly to apply the law there laid down to the facts of the present case.

The principle of the decision in Hopkinson *v.* Rolt is laid

down very clearly by Lord Campbell in giving the leading opinion in that case. He there says:—"Although the mortgagor has parted with the legal interest in the hereditaments mortgaged, he remains the equitable owner of all his interest not transferred beneficially to the mortgagee, and he may still deal with his property in any way consistent with the rights of the mortgagee. How is the first mortgagee injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent advances? The first mortgagee is secure as to past advances, and he is not under any obligation to make any farther advances. He has only to hold his hand when asked for a farther loan." It is also very clearly explained by Lord Blackburn in the case of Bradford Banking Co. *v.* Briggs,* where he says:—"It seems to me to depend entirely on what I cannot but think is a principle of justice, that a mortgagee who is entitled, but not bound, to give credit on the security of property belonging to the debtor, cannot give that credit after he has notice that the property has so far been parted with by the debtor." It will be seen from the consideration of these reasons that the only case to which their Lordships are directing their attention is a case where the subsequent advances are made voluntarily and are sought to be used to the prejudice of the second mortgagee. They do not in my opinion apply to a case in which the position of the second mortgagee is not in anywise prejudiced by the subsequent transactions between the parties and where those transactions do not either ultimately or at any moment increase the burden of the prior charge. It is so in the present case. Counsel for the plaintiff treat each cheque honoured by the bank after December 2nd, 1895, as a fresh advance voluntarily made by the bank and therefore increasing by so much the charges asserted in priority to Mrs. Deeley's mortgage. It was not so in fact. The bank were refusing to increase their advance to Mr. Glaze, and accordingly moneys had to be paid in from time to time to induce the bank to honour the cheques which he drew upon his account, as otherwise they would have been dishonoured. The limit of the charge to the bank on this property was £2,500, and this was wholly taken up by the overdraft. The amount of the payments in to meet cheques drawn by Mr. Glaze was calculated on the basis of this overdraft being covered by the security but exhausting it, and therefore the amounts paid in had to be equal to the cheques which were to be honoured or additional security had to be lodged to make up the difference. The payments made by the bank were made because an equivalent amount of money (or additional security) had been or had to be paid in on the credit side on the under-

* 12 A.C., 29 and *ante*, Vol. I, p. 75.

standing that cheques to an equal amount would be honoured against it, and it was only by reason of the bank so honouring the cheques that payments continued to be made on the credit side. If the bank had refused to honour the cheques the payments into the account would instantly have ceased and this was fully known to all the parties, and was the basis upon which the transactions took place. The further transactions consisted of payments out in consideration of equivalent payments in, and payments in in consideration of equivalent payments out. Under such circumstances neither the reasoning of Lord Campbell nor the broad principles of justice referred to by Lord Blackburn appear to me to have any application. The overdraft remained substantially unchanged by these subsequent transactions and was intended by all parties so to remain, and on the principle laid down in Hopkinson *v.* Rolt I cannot see why that charge which covered it at the date of the mortgage to Mrs. Deeley did not continue to cover it throughout in spite of these transactions which were intentionally arranged so as not to affect it. By their nature they could not increase the amount of the prior charge nor alter to his disadvantage the position of the subsequent incumbrancer.

The only way in which the plaintiff can establish her case is by saying that the Court is bound in the circumstances of this case to apply blindly the rule in Clayton's case, and to take each payment in as being appropriated by the bank to diminish the secured part of the overdraft and to take each payment out as a voluntary unsecured fresh advance. To my mind the suggestion is false in every particular. The rule in Clayton's case is only a rule of evidence, and it amounts to saying that where there is an account open between two parties and payments are made without any indication of the purpose to which they are to be applied, either on the part of the payer or the payee, the Court will, in the absence of all evidence as to appropriation by either of the parties, presume that the payee intended them to be applied to the earliest undischarged items of the account. As Lord Macnaghten says in the case of The Mecca, 1897, A.C. 286, "Where the election is with the creditor, it is always his intention expressed, or implied, or presumed, and not any rigid rule of law that governs the application of the money." In the present case there is the clearest evidence, by the behaviour of both the debtor and the creditor, that the payments were not so applied by either party as to affect the continuance or amount of the security. The evidence of Mr. Deeley is conclusive as to this. The amounts Mr. Glaze was allowed to draw were calculated on this basis, all parties so treating the situation that there was an overdraft of £2,500 secured, and that accordingly the cheques out should balance the payments in. Where that would not have

been the case, and the cheques out would have exceeded any payments in so as to increase the overdraft and leave it in their view partly unsecured, Mr. Deeley, on behalf of Mr. Glaze, used to have to deposit, as I have said, further security, which was held by the bank until the *status quo* had been restored. To my mind it is impossible to come to any other conclusion than that the payments in were taken by both parties to be made on terms that equivalent payments out should be made by the bank, and that these payments were to be so appropriated as not to affect in any way the security held by the bank. If this be so, we are bound, if it be legally possible, so to appropriate them. To my mind it makes no difference whether or not the parties at the time knew how legally so to appropriate them. Actual appropriation never takes place. It is a pure fiction of law. What is termed appropriation is a conclusion drawn by law as to the intention of the two parties or one of them. For it must be remembered that appropriation depends upon the payer and the payee, and no third party has a right to interfere, although when, as between the payer and the payee, the appropriation has been settled in any particular way, the rights of the third parties may be affected by it. Nor is there any legal necessity that a payment in should be appropriated consciously or by implication to the discharge of any one particular item of indebtedness fixed upon at the time. For instance, suppose that the creditor says, "I accept this in part discharge of whatever debts are not covered by security." That would be a good and binding appropriation, even though the creditor did not know at the time to what debts his security related. In the present case Mr. Glaze would have treated it as a breach of faith if the bank had announced to him that a payment which he had made to them diminished the security for his overdraft, and that they would not, therefore, cash cheques against it, and, on the other hand, the bank by their conduct again and again informed Mr. Glaze that they had not so appropriated the payments made by him as to affect the secured portion of the debt. How is it then possible (using the words of Lord Macnaghten) to declare that there is here "an intention express or implied or presumed" that the payments in should be applied in the discharge of past advances, so as to give priority to the subsequent charge when the whole conduct of the bank was, and was known by all parties to be, a stubborn refusal to affect in any way their position as to security or to give any indulgence to Mr. Glaze beyond the existing secured overdraft? In my opinion the position of the bank is rightly described by the commercial phrase which I have already used. They were steadily refusing, and always did refuse, "to make further advances" to him, and, in my opinion they did not make at any time further advances in the sense which must be

given to those words in order to apply the decision in Hopkinson *v.* Rolt, and, further, that the intention of all parties was, and was known by all parties to be, that the payments in should not be appropriated, that is applied, so as to affect the security of the bank, and that it was only on such terms that the further transactions took place.

The above considerations afford a complete answer to the argument that the return of the pass-book to Mr. Glaze was a communication to him from the bank to the effect that they had appropriated the payments in accordance to the rule in Clayton's case. In the present case, where all the parties knew that the payments in were so appropriated as to leave the secured balance undiminished, the receipt of the account made up in the pass-book (which is primarily for the purpose of showing the amount of the balance) would not be intended on the one hand, or understood on the other, to mean anything inconsistent with this. Although the pass-book passed backwards and forwards, the parties by their conduct showed that they recognised that the secured portion of the overdraft was undiminished. This is proof that they did not regard the account appearing in the pass-book as indicating any such appropriation as is contended for by the plaintiff. It is absurd to say that an act operates as a representation to a person when it is shown that it was not intended as such or taken by him to be such.

I will not dwell in detail on the subsequent conduct of the parties. The fact that the parties concerned acted on the common basis that the security of the bank to the amount of £2,500 was unaffected in any way, either as to position or amount, by the mortgage to Mrs. Deeley or by the subsequent transactions is not denied. But there is one matter which merits special reference because it relates directly to the plaintiff. I have already stated that in 1899, when the sale took place, Mr. Deeley, on behalf of his wife, asked the bank to release Mr. Thomas Glaze from his guarantee of £2,000 on the ground that they had been fully paid the £2,500 under the mortgage, and therefore had no claim on the guarantor. This they did, and thereby Mrs. Deeley was discharged from her sub-guarantee of £1,000 to Mr. Thomas Glaze. To my mind, this creates an estoppel against her as far as any claim to priority is concerned. It is no answer to say that she did not intend to waive her claim, because she did not know that she could set up any such claim. She knew all the facts, and her ignorance, if any, must be of the legal consequences of those facts. The bank never intended to allow their priority to be defeated by their subsequent advances, and if it is to be said (contrary to my view of the law) that they must be held to have done so because they must be taken to have known their legal rights and are estopped from saying that those acts were done in ignorance of

those legal rights, the same measure must be meted out (with much greater justice) to the plaintiff, and she cannot now be heard to assert rights inconsistent with her action in 1899, whereby she induced the bank to release a claim of £2,000, to her own substantial benefit.

For these reasons I am of opinion that the mortgage to Mrs. Deeley has not obtained priority over that to the bank, and that this appeal should be dismissed with costs.

Although I base my judgment on the special facts of the case, I wish to add a word on what I think should be the result of the application of the law laid down in Hopkinson *v.* Rolt, to the ordinary case of a mortgage to a banker to secure the balance of a customer's account. When the bank receives notice of a second mortgage by the customer to a third person, it does not in my opinion affect the nature of the security. It remains a security for the balance of the account from moment to moment. But it puts a limit to the amount of that security. It cannot be increased beyond the balance at the date of the notice, but it may be diminished. If the debit balance is at any moment brought lower than this by the subsequent payments in and out, the secured amount is correspondingly reduced, and once reduced cannot again be raised. This fully satisfies the broad principle of justice referred to by Lord Blackburn, and does not unnecessarily interfere with the position of the prior incumbrancer. All this is altered if the rule in Clayton's case is to be applied in the manner contended for by the plaintiff. The security is no longer for the balance of an account, but for certain items on the debit side. In all their subsequent transactions the bank are presumed to have the intention of applying all payments in to the destruction of their own security in favour of the subsequent mortgagee, although no sane man or sane jury could doubt that they meant to do exactly the contrary. And this is not by virtue of any rule of law. It purports to be the consequence of a rule of evidence—a conclusion of common-sense—to the effect that where there is nothing to indicate actual appropriation it is natural and proper to suppose that the eldest debit items are intended to be wiped out first. This is good common-sense where the items are on an equality, but not otherwise. Where some are secured by virtue of their being antecedent to the second mortgage no sane man would dream of extinguishing them in preference to the subsequent unsecured ones when it was a matter left to his choice. How, then, can we impute to him such an intention? What is the consequence of our so doing? If the bank are not aware of the pit dug by the law for them, they find their security gone. The second mortgage is put before the first mortgage because the law presumes in them an intention the very suggestion of which is ridiculous. If, however, they know of the pitfall they go through

the simple formality of drawing two horizontal lines in their books, and make believe to commence a new account and they are safe. I say "make believe," for it is not in truth a new account. That can only be started by arrangement with the customer. If the payments in to this so-called new account show a balance to credit, the subsequent mortgagee can claim the benefit of them, because in truth it forms part of the account for which the security was given. The whole result of the formality is that the bank are placed in precisely the position which I have first described. The security remains a security for the balance of an account, but the amount of that security cannot be raised, but may be automatically reduced. Why should it be necessary to go through such a formality to effect this? The law has refused to apply the rule in Clayton's case so as to work a wrong. Why should it apply it to cases where it would be to presume on the part of the prior incumbrancer an act of suicidal folly? No good is done thereby—it only entraps those who are unaware of the danger.

In the simple case, therefore, of a secured account with subsequent payments in and payments out, I am of opinion that the presumed intention should be to apply the payments in to the unsecured items in order of date in priority to the secured items. But in a more complicated case, where the inference of intention derived from the surrounding circumstances may not be so clear, or where the transactions are more complex, the law may well find itself justified in falling back on the rule in its simple form. This may be the explanation of the decision in Ratcliffe's case, where the circumstances were very peculiar. It ought not, I think, to be taken as warranting the proposition that in the simple case of a secured overdraft the Courts are bound to the absurdity of presuming an intention on the part of the bank which it knows to be purely imaginary and to be contrary to the dictates of common sense.

Buckley, L.J.:—The rule in Clayton's case is a rule of evidence, not a rule of law. The rule is that for the purpose of ascertaining the manner in which sums have been appropriated by a creditor, the entries in a current account kept by the creditor and communicated to the debtor are admissible as evidence to show that the earliest item of credit is appropriated towards discharging the earliest item of debit. If a banker holds a security given by his customer for his current account, and the customer pays sums to the credit of his account without directing (as he may) how they shall be appropriated, the banker is entitled to appropriate them as he chooses. The rule in Clayton's case is that an account rendered by the banker to his customer is evidence of appropriation made by the banker of the earliest items of credit on the one side, to the earliest items of debit on

the other. The entries in the pass-book are as against the banker *primâ facie* evidence that he has appropriated the amounts as shown in the account appearing in the pass-book, and the effect of such an account communicated to the customer is (in the absence of evidence to the contrary) that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other side of the account. Where the customer has not directed any appropriation, the election is with the bank. It is the intention of the bank, expressed, implied, or presumed, that governs the matter, and the rule in Clayton's case is that the entries are evidence of appropriation in the manner above stated.

A banker who holds a mortgage to secure current account is as between himself and his customer indifferent (if no question arises upon the Statute of Limitations) as to which are the debit items in the account which are to be taken to make up the debit balance for which he holds security. But so soon as the rights to be considered are not those as between the banker and his customer only, but include those as between the banker and a third party deriving title under the customer by virtue of a disposition made by the customer to such third party subsequent to the disposition in favour of the bank, there arises the question in Hopkinson *v.* Rolt. The principle lying at the root of Hopkinson *v.* Rolt is that a person cannot dispose of his property twice over to different persons. A security in favour of a bank to secure a sum and further advances operates in the case of each further advance as a further disposition of the property made at the date of the further advance, which takes effect by force of the antecedent deed of security. But if before such further advance has been made the owner of the property has already disposed of the property to a third party, say, a subsequent mortgagee, and the holder of the first mortgage has notice, then the subsequent disposition takes priority over the further advance made upon the security of the earlier disposition. The principle of Hopkinson *v.* Rolt extends to the case in which the principle of Clayton's case is involved. That was expressly decided in the House of Lords in London and County Banking Co. *v.* Ratcliffe. That was a case not of a subsequent mortgagee, but of a purchaser. But a subsequent mortgagee is a purchaser, and for all purposes relevant to the present matter purchaser and mortgagee cannot be distinguished. In London and County Banking Co. *v.* Ratcliffe the purchaser agreed with the mortgagor to buy free from incumbrances. He had no contract with the mortgagee bank. He had notice of the bank's mortgage. But, nevertheless, when he came to complete, he paid his purchase money, not to the mortgagee bank to the extent of the mortgage, and to the vendor as to the balance, but paid the whole purchase-money to the

vendor. The bank had notice of the sale. The vendor subsequently in account current paid the bank the amount due at the date of the notice, and it was held that the rule in Clayton's case applied. It is noticeable that the payment to the bank, and its appropriation upon the principle of Clayton's case, was rightful both as regards the conduct of the vendor, for it was in performance of the duty which the vendor owed the purchaser, and as regards the conduct of the bank, for they had notice of the sale. Had this not been so, the person paying the mortgage debt might have been subrogated to the bank's right as mortgagee.

His Lordship pointed out that in the present case there was an account so kept and rendered by the bank to its customer as that in the absence of anything further, Clayton's case applied.

He said that application might be excluded either, first, by contract, or, secondly, by conduct.

He held upon the language of the deeds of September 21st, 1893, and October, 1895, that no contract was made out to displace the principle of Clayton's case.

But on the facts he held that, as matter of evidence, the appropriation which would, but for other evidence, be held to result from the rule in Clayton's case, was in the present case excluded by the facts.

Appeal dismissed.

Note.—The most noticeable points in the judgment of Fletcher Moulton, L.J., which is really the leading judgment in the case, are as follows :—

1. That the rule in Clayton's case, by which payments in are attributed to the earliest undischarged debit items, is the merest presumption, liable to be rebutted by any evidence, either of contract or conduct, or even on the ground of inherent improbability, from which the contrary intention of the parties can be deduced. The rule should only be applied as a last resort, where from complexity of circumstances or lack of evidence there is nothing to show a contrary intention, on which basis he suggests London and County Bank *v.* Ratcliffe, 6 A.C. 722 is explainable.

2. That as he says (p. 874), "In the simple case of a secured account with subsequent payments in and payments out, the presumed intention is to apply the payments in to the unsecured items in order of date in priority to the unsecured items." And, again, on the same page, he says, referring to Ratcliffe's case: "It ought not to be taken as warranting the proposition that in the simple case of a secured overdraft the Courts are bound to the absurdity of presuming an intention on the part of the bank which it knows to be purely imaginary and to be contrary to the dictates of common sense."

Although Moulton, L.J., speaks of the ruling off of the old secured account and the opening of a new one as a "make believe" (p. 678), and truly enough says that a real new account can only be started by arrangement with the customer, he treats such a procedure as securing to the banker the results accruing from his judgment, possibly as being an indication of cotemporary intention. It would therefore seem advisable for the banker in all cases to adhere to the practice, especially as it is so easily followed.

[IN THE COURT OF APPEAL.]

KERRISON *v.* GLYN, MILLS, CURRIE AND CO.

1910. Reported. 26 Times L.R. 404. Journal, Vol. XXXI, p. 338.

Claim for return of Money as paid under Mistake of Fact.

This was an appeal by the defendants from the judgment of Mr. Justice Hamilton at the trial of the action without a jury, reported in the Journal for December, 1909. The action was brought to recover the sum of £500. It appeared that the plaintiff, who resided in England, was interested in a company in Mexico called the Bote Mining Company, and desired to remit from time to time money for the use of that company. The plaintiff made arrangements with bankers in New York, called Kessler and Co., by which when the Bote Company's account with Kessler and Co. ran low the latter should credit that company with £500, and advise the plaintiff to that effect, whereupon he would pay £500 to the defendants to be placed in their books to the credit of Kessler and Co.—the defendants being the London correspondents of Kessler and Co. That arrangement continued for some three or four years. On October 21st, 1907, the position was this—the Bote Mining Company had drawn their account down to a few dollars, and Kessler and Co. had credited that company with the £500 and advised them to that effect. Kessler and Co. wrote on that date to the plaintiff to credit their account with the defendants. That letter was received by the plaintiff at Ipswich, and his bankers there, Messrs. Barclay and Co., instructed their head office in London to pay to the defendants £500 for Kessler and Co. That was done on the morning of October 31st. It appeared, however, that on the previous day Kessler and Co. had stopped payment, but that fact was not known in this country till after the payment of that £500 to the defendants. The Bote Mining Company were advised that the £500 was placed to their credit with Kessler and Co., and they drew upon it, but the cheques were not presented before the stoppage of Kessler and Co. The defendants were asked to refund the £500, but they refused to do so. It appeared the defendants were large creditors of Kessler and Co., and this £500 was the last entry in their account with Kessler and Co.; and the defendants claimed the right to retain the £500 in reduction of Kessler and Co.'s indebtedness to them.

The plaintiff brought this action against the defendants to recover the £500. At the trial Mr. Justice Hamilton held that the £500 was paid by the plaintiff, not under any legal liability to do so, but only in anticipation of a legal liability, and that, as he had paid it under a mistake as to the true state of affairs, he was entitled to recover it from the defendants. He accordingly gave judgment for the plaintiff. The defendants appealed.

The Court allowed the appeal.

Lord Justice Vaughan Williams said that in his opinion the appeal succeeded. He did not take the same view as Mr. Justice Hamilton had taken as to the nature of the transaction. He thought that the true view of the transaction was that a cash credit was intended to be given and was in fact given. The sum of £500 was placed by the plaintiff to the credit of Kessler and Co.'s account with the defendants. That sum was paid as it was agreed and intended to be paid. In his opinion there was no mistake of fact at all in this case such as would entitle the plaintiff to recover this money.

Lord Justice Fletcher Moulton was of the same opinion. He said that Mr. Justice Hamilton seemed to have thought that the obligation of the plaintiff was only to pay the £500 in the event of the Bote Company's account with Kessler and Co. being overdrawn. In his opinion the obligation was to pay that amount in order to prevent the Bote Company's account from being overdrawn.

Lord Justice Farwell concurred.

Appeal allowed.

WILSON *v.* KELLAND.

1910. Reported. [1910] 2 Ch. 306. Journal, Vol. XXXI, p. 339.

Priority of Debenture-holders.

THIS was an action raising a question whether debenture-holders under a floating charge had priority over a specific mortgage. It appeared that by a trust deed of March 5th, 1901, the Bedford Brewery (Plymouth), Limited, conveyed and assigned all their property present and future to the Law Guarantee Trust and Accident Society to secure certain debentures, and it was provided that such trust deed was to operate as a floating security and so that the company should not be at liberty to create any charge on such premises ranking in priority to or *pari passu* with the security of the debenture-holders. The debentures themselves, however, provided that they were not to operate so as to prevent the company charging subsequently acquired property in priority. On January 27th, 1905, the brewery company mortgaged certain property to Kelland for £3,000. The said £3,000 so secured was the unpaid balance of the purchase money for which the brewery company had shortly before the date of the mortgage agreed to purchase the premises comprised in the mortgage. On June 7th, 1906, the brewery company conveyed the equity of redemption in the mortgaged premises to the plaintiff. On July 16th, 1909, Kelland transferred his mortgage to the plaintiff, who at the date of the trust deed and down to November, 1908, was a director of the company. The defendant society claimed that the plaintiff took with notice of the trust deed, and therefore that the mortgaged premises were subject to the trust deed. The plaintiff claimed priority over the trust deed and the debentures thereby secured, and commenced this action for foreclosure on April 14th, 1909.

Mr. Justice Eve delivered the following judgment:—

As regards the mortgage of January 27th, 1905, it is, in my opinion, immaterial whether the mortgagees had or had not notice of the deed of 1901 and the debentures thereby secured. Any equity which attached to the property contracted to be purchased in June and conveyed to the company in September, 1904, in favour of the debenture-holders or their trustees was through-

out subject to the paramount equity of the unpaid vendors; and the legal mortgage which secures the unpaid purchase moneys must, in my opinion, take priority over any charge to persons claiming through the purchaser. I hold, therefore, that the plaintiff is entitled to priority over the defendant society in respect of the mortgage of 1905. The evidence proves that the vendor mortgagees had no actual notice of the debentures and the trust deed, but had I come to the conclusion that the priority of their mortgage depended upon the question whether or not they had any notice I should have been prepared to hold that the particulars registered in this case pursuant to sec. 14 of the Companies Act, 1900, amounted to constructive notice of a charge affecting the property, but not of any special provisions contained in that charge restricting the company from dealing with their property in the usual manner when the subsisting charge is a floating security. I think this view is in accordance with the judgment of Mr. Justice Kekewich in *In re* the Standard Rotary Machine Company, Limited, 95 L.T., 829, 834. The real difficulty in the case arises in respect of the mortgage of June 7th, 1906. Was it competent for the company at that date to give the plaintiff a security ranking in priority to the security of the debenture-holders? The answer depends on the true construction of the debentures and the trust deed securing them, and on this the difficulty of reconciling the provisions of Clause 6 of the deed with the third condition endorsed on the debenture raises a serious question. If it were permissible to conjecture how the inconsistency between the clause and the condition arose, it would not be difficult to attribute it to an omission on the part of the draftsman to add at the end of Clause 6 of the deed the proviso which would seem to have been added to the third condition as originally framed. But the duty of the Court in this action is to construe, not to reform, the contract, and, in so doing, to give effect, if possible, to all its terms. To effectuate this I think I am bound to hold that in the proviso with which condition 3 concludes the words "herein" and "hereby" must be read as equivalent to "in this debenture" and "by this debenture," and that the proviso cannot be treated as controlling, or qualifying, the security created by the trust deed. The debenture-holder has the cumulative benefit of the security created by his debenture and by the trust deed; the former is not to operate so as to prevent the company charging subsequently acquired property in priority to or *pari passu* with it; the latter is so to operate unless and until modified by the debenture-holders under the provisions contained in the fifth schedule to the deed. No such modification having been made, I come to the conclusion that the company could not in June, 1906, create a security in favour

of the plaintiff ranking in priority to the trust deed, and accordingly I hold that in respect of this mortgage the plaintiff is not entitled to any order for foreclosure against the society. In respect of the mortgage of January 27th, 1905, there will be the usual foreclosure order against the company and the society and an order for delivery of possession to the plaintiff of the mortgaged premises.

Order accordingly.

[IN THE COURT OF APPEAL.]

PARSONS *v.* BARCLAY & COMPANY AND ANOTHER.

1910. Reported. 26 Times L.R. 628. Journal, Vol. XXXI, p. 452.

Opinion as to position of customer—Duty of Bank and Manager.

THIS was an appeal from verdict and judgment at a trial before Ridley, J., and a special jury.

The action was for damages for misrepresentation. The plaintiff was contemplating putting money into an engineering company called Gilletts, Ltd., and before doing so requested his bankers, the Metropolitan Bank, at Chipping Norton, to find out what they could as to the company's financial position. They accordingly applied for information to a branch bank of Messrs. Barclay & Company at Feltham, near which place the company carried on business, and received in reply from Mr. Goddard, the manager of the Feltham Branch, a letter in which he stated that the company had a satisfactory account with them, and appeared to be doing a genuine and increasing business, and that its two managing directors were men of experience in that form of business. It afterwards appeared in evidence that the account had been in credit to a moderate amount most of the time it was open, but had occasionally been overdrawn for very small amounts for very short periods. The letter added that it was written for the private information of the Chipping Norton Bank only, and that no responsibility would be taken for the information given. The Chipping Norton branch of the Metropolitan Bank did not send on the letter or a copy to the plaintiff, but their manager, Mr. Arkell, wrote to him giving substantially the information received, using the words "they are doing a genuine and increasing business under good management."

The plaintiff thereupon put money into the company and lost it. He brought this action, seeking to make Messrs. Barclay, or alternatively Mr. Goddard, the manager, responsible for the loss on the ground of misrepresentation. Early in the proceedings Messrs. Barclay were dismissed from the case on the ground that the representation was not given under their seal, by which alone they as a corporation could be bound (Swift *v.* Jewsbury, L.R., 9 Q.B. 301), and the action proceeded against the manager, Mr. Goddard alone.

In summing up to the jury, Ridley, J., made the following remarks, which were the subject of comment in the Court of Appeal. After stating that the first two questions for their consideration were (1) Did Goddard make the representation with the intention that it should be passed on as his, or as the representation of the Metropolitan Bank? (2) Was the letter of the Metropolitan Bank substantially the same as his? His Lordship continued :—

The final question is whether the defendant, in making the statement which he did, was fraudulent. That is the main question in the case, to which you will give, of course, your very full and very anxious consideration. There are one or two remarks made by defendants' counsel about the duty of a bank in answering questions of this kind with which I do not find myself thoroughly in agreement. I do not know, I am sure, whether you will be, but it does not seem to me to be quite fair to say that if you put a question similar to the question put in this case by the plaintiff who wanted to have information about the soundness of the company in which he was wishing to invest, that the bank are to answer according to their knowledge and not to make enquiries in order to give a satisfactory answer. I should have thought that they are not to answer at all unless they can answer truly. The bank's position is this, they are not entitled to anything that the bank did not know; in other words, if Goddard had not chosen to inform himself as to the financial position of Gilletts, nor of the financial position of the firm, he is not entitled to give them any information about it, and the true answer would be : We cannot answer this question, and that would be the proper reply of the bank. Goddard was bound, as it seems to me, to make enquiry if he was going to answer the question about the financial condition of the company. If he did not know enough, he was bound to find out enough before he answered the question, or to make no answer at all. That seems to me to be no more than common honesty. I understand the argument to be : Oh, no ; you may answer as though you did know, when in point of fact you do not, because it is not your business to inform yourself. That, gentlemen, I cannot accept. If that is the meaning of the argument of defendant's counsel, it seems to me it is not a just or proper view of the duty of a bank in answering such enquiries.

Then there is a question about what is the right of a bank to answer such enquiries. I am not sufficiently aware of the practice of bankers, but I believe the practice is not to answer general questions, but only answer them through some other bank. They certainly have a right to refuse to answer, but I do not see why that is to interfere with your duty in this case, which is to ascertain first of all what are the true answers to the first two minor questions in this matter, and finally to answer this question : Did

Goddard do his duty honestly, or were the statements which he made not merely mistaken statements, but were they fraudulent?

The Judge then dealt with the subordinate questions, whether the representation was intended to be handed on, and whether the letter of the Metropolitan Bank substantially reproduced that of the defendant, and proceeded:—

If those two questions are answered by you, you will then come to the third, Were the statements of the defendant fraudulent? That is no doubt the important question in the case. I have to tell you that it will not do for you to find it was an inaccurate description of the state of things with regard to Messrs. Gilletts, Limited, it must be inaccurate to the knowledge of the person who made it. Though with some qualification that would be a true statement, I think I will just give the definition which is usually accepted as the one which is to guide a jury in such cases. "In order that the statement should be fraudulent"—which it is necessary to prove in this case if the plaintiff is to recover—"it must be made knowing it not to be true, or without belief that it is true, or it must have been made recklessly or carelessly as to whether it was true or false." That is to say, he must have been without belief in its truth; he must have had no genuine belief in the truth of the statement which he was making. If that was the condition of things, and that he recklessly, and not caring, and without any genuine belief that he was making a true statement to the plaintiff, did write this letter, he would be responsible for it, but not unless that was the condition of mind in which he made it. To say it wrongly, merely from mistake—if he thought it was true—would not make him liable in this action, but if he did not think it was true, he had not arrived at the condition of belief that these people were in a good financial position, and if he recklessly made the statement upon insufficient knowledge, without having in his mind a belief that they were a genuine and prosperous trading company, he would be responsible. It is the condition of his mind. Had he in mind the belief that they were a genuine and prosperous trading company? The word "prosperous" is my own, but it seems to me to be practically what he said in his letter.

Defendant's counsel has argued a good deal as to the meaning of that letter, and no doubt the question which you will have to answer depends not only upon the mind of the defendant Goddard, who wrote the letter, but also upon what is the effect of the statement contained in it. I have read it to you once already, and I am not going to do it again. It appears to me it amounts to this, it was so genuine a business doing such a trade that it would be prudent to put your money into it. I do not see how it can be denied that that is the effect of it. It is a satisfactory account, it is a genuine and increasing business under two experienced men.

But if I follow the argument correctly, counsel says it would not have been right to say that it was a paying business. He said that in his remarks to you. Putting that letter before you, do not you think you would suppose he meant that it was a paying business? I understood it to be the argument that the letter does not say it is a prosperous business in the sense that it was paying, but he had no right to say that, says the learned counsel. Gentlemen, what does it say? Surely it says almost in so many words that it is a paying business.

Ridley, J., then proceeded to comment on the evidence as to the actual position of the company referred to and on some other points, and left certain questions to the jury in answer to the third of which they found that the defendant made the representations recklessly and carelessly, he not having fully satisfied himself as to the accuracy of the report. In answer to a further question proposed by the Judge himself, the jury found that the defendant made the representations without an honest belief that they were true. They therefore found a verdict for the plaintiff for the damages claimed £1,100, for which judgment was entered, a formal verdict and judgment being given in favour of Messrs. Barclay & Company on the ground above stated.

The defendant Goddard appealed.

The Court of Appeal allowed the appeal, commenting strongly on the proceedings in the Court below, as follows:—

The Master of the Rolls, after reviewing the facts of the case, said: It reduces itself to this: is there any evidence that this statement of Mr. Goddard's opinion that Messrs. Gillett "keep a satisfactory account with us here" was a statement fraudulent in the sense in which I have used that word. I do not find a particle of evidence that it was. In the first place, a "satisfactory account" is a banker's phrase and means, no doubt, satisfactory in the opinion of the bank. A large account is, no doubt, *ceteris paribus*, more satisfactory to a bank than a small account, and it is common ground that this was a small business and a small account. But is there any evidence whatever worth a moment's attention that this was other than a satisfactory account in the honest opinion of Mr. Goddard, and in the honest opinion of bankers, whose opinion alone is material in this case? There is no banker at all called to say that this was not a satisfactory account in the opinion of the banker. It was a small account; it was the account of a business which was increasing—I think the wages show that plainly—and it was an account which had been overdrawn, it is true, for very small amounts, and for very short periods, but under circumstances which do not in the least prevent this account being, in the opinion of the banker, a satisfactory account.

Now one of the plaintiff's witnesses certainly takes up a position which, although I do not pretend to be a banker, seems to me to be a most extraordinary one. He seems to think that this is not a satisfactory account, because it shows that the credit balance was reduced, and the expenses of the business were really paid out of capital. If I know anything about business, capital is brought in for the very purpose of being expended in the business. You do not carry on business by investing your capital in Consols and merely applying the dividends on the Consols to the business. The very essence of a business of this kind is that fresh capital is got into the business in order that it may be used in the conduct of the business. That being the opinion of this witness, he not being a banker, and he giving evidence which seems to me to be plainly and obviously contrary to the common sense of the matter, I come to the conclusion that it was altogether wrong to say that this gentleman, Mr. Goddard, was guilty of fraud in making a statement which seems to me to have been perfectly honest, perfectly fair, and perfectly right.

I desire for myself to repudiate entirely the suggestion that when one bank is asked by another for a customer such a question as is asked here, it is in any way the duty of the bank to make enquiries other than what appears from the books of account before him, or, of course, other than what he knows from his personal knowledge. To suppose that a banker receiving a letter of this kind is to be found guilty of fraudulent conduct unless he goes about and makes enquiries, such as; is yours a profitable business; or, is it a paying business; or, is it a business in which I should be inclined to invest money myself? I repudiate any idea that that is any part of the obligation of a banker. I think that if we were to take the contrary view which commended itself to Mr. Justice Ridley in his summing up to the jury, we should necessarily be putting a stop to that very wholesome and useful habit by which one banker answers in confidence, and answers honestly, to another banker, the answer being given at the request and with the knowledge of the first banker's customer; and, if he answers honestly according to his own knowledge of what he knows from the books before him, and from any other actual knowledge he has, it would be most dangerous for us to do anything which would prevent that wholesome and businesslike practice being pursued.

In my view, there was no evidence fit for the consideration of the jury in this case; and Mr. Goddard ought to be clearly, frankly, and finally exempted from any charge of fraudulent conduct.

In my opinion the appeal should be allowed and judgment entered for the defendants.

Lord Justice Farwell:—I am of the same opinion. I think there has been here a lamentable miscarriage of justice, by which a stigma has been inflicted on a perfectly innocent gentleman. I think, moreover, that if that judgment should stand, it would have the most pernicious effect on the custom which is well established among bankers and was known to everybody, except, perhaps, the persons who took part in the trial below.

It is stated by Baron Bramwell, in Swift v. Jewsbury, L.R., 9 Q.B., 301, that it is a well-known custom amongst bankers, and, he says:—"It is true that the jury have found that it was within the scope of the manager's authority to give the information asked for, and if the manager were to refuse to give it he would be doing a wrong to the bank which employed him, because he would be refusing a courtesy which it was their habit to show in order that a corresponding courtesy might be shown them; but in no other sense was it his duty or within the scope of his authority to do it."

I thought everyone knew that these enquiries between bankers were well understood, were familiar, and that nobody supposed that one bank could ask another to go and hunt about and make enquiries. If enquiries are to be made, let the enquiring bank make them.

Lord Justice Kennedy concurred.

Appeal allowed and judgment entered for Mr. Goddard.

THE ATTORNEY-GENERAL *v.* CORPORATION OF WEST HAM.

1910. Reported. [1910] 2 Ch. 560. Journal, Vol. XXXI, p. 454.

Overdrafts by Corporation—Question of ultra vires—*Accounts of separate Undertakings—Subrogation.*

This was an action by the Attorney-General, at the relation of certain ratepayers of the Borough of West Ham, against the Corporation and Mr. Patterson (their treasurer), and their bankers, the London and County Bank, and raised important questions as to the validity of the Corporation's overdrafts at the bank during the three years ending March 31st, 1908, and the manner in which they kept their accounts at the bank. The statement of claim alleged (amongst other things) that the Corporation's overdraft at the bank on March 31st, 1908, was £90,949 4s. 4d. on capital account and £44,952 12s. on revenue account, and that, of these sums, £20,817 7s. 9d. on capital account, and the whole of the £44,952 12s. had respectively been borrowed without the sanction of the Local Government Board, and were wholly unauthorized and illegal; that the Corporation's illegal overdrafts on capital and on revenue account at the bank had been continuous and increasing during the three years ending March 31st, 1908, that the bank had each year charged and paid themselves interest on these illegal overdrafts, and that these payments of interest were defrayed out of the fund or rate applicable to the general purposes of the Public Health Act, 1875, were illegal and breaches of trust to which the bank were privy. The statement of claim further alleged that the Corporation kept one general account at the bank, which in fact comprised, and was an amalgamation of, ten different accounts in respect of separate undertakings under various Acts of Parliament, that the moneys received for each undertaking were trust moneys held upon a separate and distinct trust from every other account of the Corporation, which the defendants well knew, that this amalgamated account had been wrongfully applied in reduction of illegal overdrafts during the period in question, and that the bank had paid themselves interest on these illegal overdrafts during the period in question to the extent of some £14,000; and the plaintiff claimed (*inter*

alia) declarations that the above transactions were illegal and *ultra vires*, and that the defendants Patterson and the bank might be ordered to restore to the funds of the Corporation the alleged illegal overdrafts and all payments of interest on such overdrafts. The defendants denied all the allegations of the plaintiff. In particular the Corporation and their treasurer alleged that all moneys borrowed by the Corporation were used and applied in payment of the lawful debts due to lawful creditors of the Corporation, and the bank alleged that the relation between them and the defendant Corporation and their treasurer was the ordinary relation of banker and customer, and that they were wholly unaware of the purposes for which the cheques were drawn, and that all moneys overdrawn from them by the Corporation were duly and properly applied in payment of the Corporation's just debts and liabilities, and that they (the bank) were in any event entitled to stand in the place of the creditors whose debts were so paid and to be subrogated to their position. During the trial of the action the plaintiff and the bank came to an arrangement whereby, upon payment by the bank to the Corporation of £7,000 in respect of the payment to the bank of interest on the balances of overdrafts and upon the bank agreeing to pay plaintiff the difference between party and party costs and indemnity costs of the plaintiff, such sum to be settled by Sir Thomas Rawle in case the parties differ, further proceedings against the bank were stayed. But this left untouched the main issues between the plaintiff and the Corporation. The arguments involved the construction of various Acts of Parliament and the consideration of accounts of much complexity during the three years in question, and at the conclusion of the arguments judgment was reserved.

Neville, J., subsequently gave judgment as follows:—In this case the Attorney-General sues the Corporation of West Ham to put an end to alleged illegality on the part of the Corporation in the conduct of the businesses entrusted to them by the Legislature. The statutory powers of the Corporation include the supply of electricity and of electrical fittings. For these and other purposes they have been entrusted with extensive powers of borrowing, in some instances (including their electrical undertaking) to be exercised with the sanction of the Local Government Board. The Corporation had ten different accounts at their bankers, into one of which, the general account, they paid all receipts on account of the borough fund and the general district rate, and upon which they drew in respect, amongst other things, of their expenditure upon their electrical undertakings. The Corporation kept in their books two electricity accounts, one called the capital account, dealing with expenditure on fixed capital, and

the other the revenue account, which, besides showing the surplus or deficiency on the year's working, included their expenditure upon electrical fittings and stores. For the latter they had borrowing powers to be exercised with the sanction of the Local Government Board, but they had not on March 31st, 1908, obtained any such sanction. Any deficiency upon the year's working was estimated for in the rate for the following six months and levied; but no estimate was made in respect of the capital expenditure upon the electrical undertaking whether fixed or floating. This was found either from other funds of the Corporation not properly applicable for that purpose or by overdraft from the bank. On March 31st, 1908, the overdraft on the electricity revenue account was over £44,000, and on the capital account over £92,000. In my opinion these overdrafts were illegal. On April 15th sanction was obtained from the Local Government Board for a loan on electricity capital account of some £64,000. Towards the end of 1905 by this and other expenditure made for legitimate purposes, but which was intended to be met out of funds to be produced by the exercise of their borrowing powers and for which consequently no estimate was made or rate levied, the Corporation had got themselves into considerable financial difficulties and were unable without financial assistance to provide for their current expenditure. They had at this time unexhausted borrowing powers which (upon the sanction of the Local Government Board being obtained) would, if exercised, have to some extent enabled them to recoup their expenditure upon capital accounts, and in the month of December, 1905, they applied for sanction to borrow moneys in respect of certain works. It is only fair to the Corporation to say that the sanction which was ultimately given in respect of the greater part of their application was not so given until April 18th, 1908, and this delay undoubtedly added to their embarrassment and tended to prolong the period during which they sought assistance. In this state of affairs the Corporation in the month of November, 1905, applied for an overdraft to the defendant bank, and after some negotiation an overdraft was granted to them to the extent of £120,000, subsequently increased to £200,000. From the time when the overdraft was granted until shortly before the commencement of the action the accounts were almost continuously overdrawn. At the time the Corporation obtained the overdraft they had unexhausted borrowing powers, and I will assume that these were in excess of the overdraft, though the evidence is somewhat meagre on the point. The Corporation appear to have considered, and they certainly acted, as though they were entitled to use moneys borrowed under specific powers, not merely for the specific purposes for which the powers were bestowed, but for any purpose to which any funds of the Cor-

poration could lawfully be applied so long as they kept proper accounts of the expenditure. I think the correspondence and applications to the bank show that they intended so to apply the bank's advances from the first: see, *inter alia*, Mr. Patterson's letter of December 7th, 1905—and in fact the overdraft was allowed on all the accounts and a general balance struck daily upon them all. In my opinion, this view of the position of the Corporation was erroneous. I think if they raised moneys under a borrowing power they were bound to apply the moneys so raised for the specific objects indicated by the statute. I think upon this ground the obtaining of the overdraft was *ultra vires* of the Corporation. Whether an overdraft extended over several years for substantially the whole amount of the authorized loan could be justified as a temporary loan within the meaning of the decisions I need not decide, but in my opinion the question is at least doubtful. Upon the point whether having regard to the statutory provisions under which corporations are enabled to procure the funds to discharge their liabilities they are entitled to borrow money by way of overdraft for general expenditure, at all events except under special circumstances, I also reserve my decision. The impropriety of municipal corporations incurring large expenditure on capital account in anticipation of sanction for loans not yet obtained is well illustrated in the present case, where the Corporation failed to obtain sanction for a loan in respect of an expenditure of over £10,000 on electricity account, with the result that they were driven to make a levy for the amount, in my opinion an illegal levy, inasmuch as the proceeds were applied in payment of liabilities incurred more than six months before the levy of the rate. The bank having agreed terms with the plaintiff, I refrain from discussing what, upon the evidence, their position would have been in respect of their advances. On March 31st, 1908, the general account of the Corporation with the bank was largely overdrawn—to the extent of some £38,000 after deducting the amount due to the consolidated loans fund, but which had, from time to time, been paid into the account in reduction of the overdraft in accordance with an arrangement with the bank. In my opinion the application of the amounts due to the consolidated loans fund in reduction of the overdraft was illegal.

At the trial application was made for leave to plead the Public Authorities Protection Act, 1893, and the Trustee Relief Act, 1888. In the course of the trial I gave such leave subject to all questions of costs and adjournment, and the matter proceeded upon that footing. Counsel for the Attorney-General having refrained from asking for relief against the defendant Patterson personally, the Trustee Relief Act can have no application. The question of the applicability of the Public Authorities Protection

Act, 1893, was not fully argued. In my opinion, however, it would apply in favour of the Corporation and the borough treasurer in respect of acts completed more than six months before action. The overdraft, however, from the bank and repayments out of moneys due to the consolidated loans fund continued up to a period within six months before the commencement of the action, and I think the plaintiff is entitled to declarations in respect of such continuing illegality. Although the plaintiff is not entitled to all the relief claimed, I think that, having regard to the time at which the application to amend was made, this should make no difference as to the incidence of the costs of the action. I propose to declare:—1. That the overdraft obtained from the bank for general purposes in respect of borrowing powers granted for specific purposes was *ultra vires* and illegal; 2. That the application of money due to the consolidated loans fund in repayment of such overdraft was *ultra vires* and illegal; 3. That the borrowing of money from the bank for the purpose of the electricity accounts otherwise than in the exercise of borrowing powers with the sanction of the Local Government Board was *ultra vires* and illegal. The defendant Corporation and the defendant Patterson must pay the costs of the action.

Declaration accordingly.

Note.—See the note to Rex *v.* Locke—*ex parte* Bridges and others, *post*, p. 273.

THAIRLWALL *v.* GREAT NORTHERN RAILWAY CO.

1910. Reported. [1910] 2 K.B. 509. Journal, Vol. XXXI, p. 462.

Payment by Dividend Warrant—Sending by Post—Lost Warrant—Whether negotiable Instrument.

The plaintiff had been for some years a stockholder in the defendant company and had always received dividend warrants by post. Endorsed on the certificates which he held was a notice to the effect that dividends were payable by warrants which would be sent by post to the proprietor's registered address. On February 4th, 1909, the company's half-yearly report was issued to the stockholders, including the plaintiff, stating that the profits justified the declaration of a dividend. On the back of the report was printed in large type: "The dividend warrants will be payable on Tuesday, February 16th, 1909, and will be sent by post to the proprietors on the previous day."

The dividend was declared on February 12th, and on February 15th a dividend warrant for £2 10s. 10d. was sent by post to the registered address of the plaintiff. This warrant was crossed generally and was in the following form:—

"Union of London and Smiths Bank, Ltd.,
No. 2, Princes Street, London.

Pay to the order of
The sum of
£ : : . E. H. Burrows, Secretary.
Signature of Payee.

Note.—This warrant must be signed by the person to whom it is payable, and presented for payment through a banker. It will not be honoured after three months from date of issue unless specially endorsed by the Secretary."

This warrant was lost in the post and never reached the plaintiff. It had not been presented for payment by anybody. Payment was stopped at the bankers. Plaintiff wrote asking for a duplicate warrant. The defendant company agreed to give it on the plaintiff signing the usual indemnity. This the plaintiff refused

to do, and sued the company in the County Court for £2 10s. 10d., the amount of the dividend, less income tax, due and declared for the half-year on the stock held by him.

The County Court Judge gave judgment for the plaintiff.

The company appealed.

On the part of the appellants it was contended:—

1. That the dividend had been paid in manner provided by statute or requested or assented to by the plaintiff and that posting the warrant was therefore absolute payment to the plaintiff.

2. That the company had, at the request of the plaintiff, constituted him the holder of a negotiable instrument, which, being lost, he could have another, but only on the terms of giving security to indemnify under sec. 69 of the Bills of Exchange Act, 1882.

For the respondent, the plaintiff:—

1. That there had been no request by the plaintiff for payment in this particular way.

2. That if there was a request to pay by means of a dividend warrant sent by post, the document sent was not a dividend warrant. That a dividend warrant must be a cheque, *i.e.*, an unconditional order in writing drawn on a banker payable on demand.

That this document was not unconditional, first, because it would not be paid unless presented within three months from date of issue. Second, because it would not be paid unless signed by payee, which it had not been.

3. That the document, not being a negotiable bill, the giving it was no defence to an action for the debt for which it was given.

The Court, Bray and Coleridge, JJ., allowed the appeal.

The main ground of the judgment was that in the circumstances, the only obligation on the company was to send the plaintiff a dividend warrant, that they did send such a warrant in the authorized way, and so were discharged.

The contention that a dividend warrant must be a cheque and that the document in question was not a cheque by reason of its conditional character and that the plaintiff could therefore sue without giving indemnity was dealt with by the two judges respectively as follows:—

Bray, J., said:—When the dividend warrants had been sent to the proprietors on February 15th, the stockholders had no further remedy except upon the documents sent, the dividend warrants.

Now it is said that that is not so, because the documents sent were not cheques. A dividend warrant, it was said, must be a cheque, and the document sent was not a cheque, because it had this condition at the bottom of it:—"It will not be honoured after three months from date of issue unless specially endorsed for payment by the secretary." I have felt a great deal of doubt on this point because of this statement. But, on the whole, I incline to think that this document is a cheque, and is within the meaning of secs. 73 and 3 of the Bills of Exchange Act, 1882, a cheque and an unconditional order in writing, addressed by the drawer to his banker, etc. And I think it is none the less a cheque because of that statement at the bottom of the document. I do not consider that statement makes the order conditional. It is unnecessary to say more than this; for whether it be a cheque or not, in my opinion it was a document, which it was contemplated that the stockholders should receive. The stockholder was to receive a dividend warrant. If the point had been taken I am sure it would have been proved, in two seconds, that this was an ordinary dividend warrant. I base my decision on this point on the ground that the only obligation on the company was to pay by means of a dividend warrant, that they sent this document, which was such a warrant, and that the warrant having been sent the company were discharged. It is unnecessary for me to say what are the remedies of the plaintiff. If the document is a cheque, as I think it is, he is entitled under sec. 69 of the Bills of Exchange Act to obtain from the company another document of the same tenor, but only on giving security to the company to indemnify them against all persons whatever in case the warrant alleged to have been lost shall be found again, or he may bring an action on the bill. I base my decision on the ground that the only obligation on the company was to send the plaintiff a dividend warrant, and that they did, and so became discharged.

Coleridge, J.:—It was argued that this dividend warrant was not a bill of exchange within the meaning of the Act, because it was not "an unconditional order in writing" within sec. 3; and it is said that it was not an unconditional order in writing because of the words at the foot of it stating that it would not be honoured after three months from the date of issue unless specially endorsed by the secretary. In my opinion these words have not the effect claimed for them of making the warrant other than an unconditional order for payment. I regard them merely as a definition by the directors acting under the authority of the stockholders as to what shall be a reasonable time within which the warrant must be presented, having regard to the nature of the instrument, the usage of trade and of bankers,

and the facts of the particular case. A cheque is none the less a bill of exchange within the Act because by sec. 74, the drawer may be discharged if the cheque is not presented within a reasonable time, regard being had to the same considerations. These warrants are not made less unconditional than other cheques by having those words at the foot of them, which merely give notice that the directors have fixed three months as the reasonable time within which the warrants must be presented, and after which, if the warrants have not been presented, inquiries will have to be made before the holder receives payment.

Appeal allowed.

Note.—It is not easy to see on what ground it can be contended that a dividend warrant is necessarily a cheque. Sec. 95 of the Bills of Exchange Act, by applying the provisions of the Act as to crossed cheques to a warrant for payment of dividend favours the opposite view.

The chief importance of the case lies, however, in the expression of opinion as to the effect of clauses such as that cited on the negotiability of documents containing them, with its consequent bearing on the protection afforded the paying banker under sec. 60 of the Bills of Exchange Act or sec. 19 of the Stamp Act, 1853. The doubts expressed by Bray, J., are certainly well founded.

The normal liability of the drawer of a cheque enures for six years.

Sub-sec. 2 of sec. 74, as to the method of determining reasonable time, has reference solely to the substantive clause of the section. The introduction of the words "the nature of the instrument" might suggest a larger application, but modern rules of interpretation require that sub-sections and provisoes should be confined to the subject matter of the section to which they belong. The whole section comes under the classification of "cheques drawn on a banker" (*cf.* Inglis *v.* Robertson [1898] A.C., 616), while the existence of a separate similar definition of reasonable time in sec. 45 (2) clearly shows that sec. 45 governs the rights of all parties to a bill payable on demand not drawn on a banker and of the indorsers of a cheque, while sec. 74 regulates the exceptional case of the drawer of a cheque. It is clumsy legislation, but the position of the drawer of a cheque, though technically that of the drawer of a bill, renders it impossible that he should be released from liability, both on the instrument and on the consideration, by omission to present immediately.

The concession by statute, in a rigidly defined combination of circumstances, of certain exemptions on non-presentation within a determinable time is hardly the same as an arbitrary limitation of personal liability on the part of the drawer, irrespective of any

such circumstances, and in default of presentation within a period far short of that ordinarily necessary to preserve that liability.

Bearing this in mind, the effect of the clause in question is surely this: "I, the drawer, am liable in law if this cheque is presented for payment at any time within six years of issue and dishonoured. I issue this cheque on the terms that unless presented within three months, I can disclaim liability." And that is very like a condition. No doubt there is a custom among bankers to refuse payment of cheques which have been outstanding for periods varying from three to six months. That is not what is aimed at by sec. 74 (2), and it has never been suggested that it has any bearing on the liability of the drawer. Even if not a condition of the liability of the drawer, the note in question appears to qualify one of the usual incidents of holdership, namely, the right to have the cheque paid on presentation at any time before it is technically "stale."

A point, not apparently raised in this case, is that under the definition of a bill in sec. 3 of the Bills of Exchange Act, 1882, it is only the order to the drawee which must be unconditional, not necessarily the contract with payee or holder. See Nathan *v.* Ogdens, 22 Times L.R., 57, and the judgment of A. T. Lawrence, J., in that case in the Court below.

On the basis of that case, the question would be whether the note, assuming it to import a condition, was addressed to the drawee or affected him, though not embodied in the order. It certainly seems an intimation which a banker could hardly ignore.

As the document was crossed, no question arose on the requisition of payee's signature, that being in any case necessary for collection.

[IN THE COURT OF APPEAL.]

KOCH *v.* MINERAL ORE SYNDICATE. LONDON AND SOUTH WESTERN BANK, LIMITED, GARNISHEES.

1910. Reported in the Solicitors' Journal & Weekly Reporter, 24th May, 1910. Journal, Vol. XXXI, p. 459.

Garnishee Order Nisi—No Account corresponding with Name of Judgment Debtor—Cheques drawn pending Rectification.

Appeal by the garnishees, the London and South Western Bank, Limited, from the decision of A. T. Lawrence, J., at chambers, reversing an order made by Master Chitty on the hearing of an order *nisi* made under the following circumstances. On the 8th of March, 1910, Messrs. Adler and Perowne, solicitors for the judgment creditor, served the bank with a copy of the garnishee order which in terms attached all moneys owing from the garnishees to Ernest Frederick Julius Berckhardt, trading as the Mineral Ore Syndicate. On the morning of the following day the bank, as an act of courtesy, informed Messrs. Adler and Perowne that they had no account in either of these names. Later in the day Messrs. Adler and Perowne called at the bank, and stated that they had seen Berckhardt, who had informed them that his account with the bank was in the name of the General Import Co., and they (the solicitors) asked the bank to attach the balance on that account under the order *nisi*. The bank refused. The bank had an account in the name of the General Import Co., which was operated upon by cheques drawn by "Julius Berckhardt, managing director," and the balance of that account at the date of the service of the summons was £16 2s. 7d. The bank always followed the principle that an order *nisi* did not attach the balance of an account unless the order correctly set forth the name of the account as it stood in the books of the bank, and on that ground, and also because they wanted to be satisfied that no other person was interested in the General Import Co.'s account, they refused the solicitors' request to attach the balance of that account. The solicitors, on being informed of the bank's decision, offered to try and bring Berckhardt to the bank with a view to his identification as the judgment debtor, and acknowledgment that the order *nisi* referred to him. To this the bank

offered no objection, and later in the day they returned to the bank and stated that Berckhardt was there. Messrs. Adler and Perowne's clerk then introduced a gentleman. He was asked if he had not something to say to the manager of the bank, and replied in effect that he had not, and, after obtaining a pass-book, left the bank hurriedly, and without saying another word. The object for which the interview was obtained having failed, Messrs. Adler and Perowne were informed that the matter must take its course, and the solicitors left, saying they would get the order amended. About an hour after the visit of Berckhardt a cheque for £14, drawn by the General Import Co., and signed by Julius Berckhardt, managing director, in favour of a Miss Quill, was presented, and cashed by the bank. Subsequently Messrs. Adler and Perowne again called, stating that they had seen Master Wilberforce with a view to having the order amended, but that the Master did not think this was necessary, and the solicitors warned the bank against parting with the money. On the same day the bank cashed against the same account, on the order of Julius Berckhardt, another cheque for 17s. 7d. On the 22nd of March the order *nisi* was heard before Master Chitty, who ordered "that the order be amended by substituting Julius Berckhardt for Ernest Frederick Julius Berckhardt, and by adding also 'trading as the General Import Co.' after the words 'judgment debtor.' And it is ordered that the said garnishee (after deducting therefrom £1 1s. for his costs of this application) do forthwith pay to the said judgment creditor 4s. (being the balance remaining in the hands of the bank after honouring the two cheques of £14 and 17s. 7d.), the debt due from the said garnishee to the said judgment debtor, Julius Berckhardt, trading as the General Import Co., and that in default thereof execution may issue for the same." On appeal from that order to A. T. Lawrence, J., in chambers, that learned judge allowed the appeal on the ground that, in his opinion, Berckhardt had been sufficiently identified to the bank, and consequently they had acted at their own risk, but granted leave to appeal. On behalf of the bank, it was pointed out that if the order stood, banks were placed in an exceedingly difficult and wholly untenable position, for the onus was put upon them to decide all doubtful cases where there was a discrepancy in the names, whether or not they were to attach the balance on any particular account pending the hearing of the order *nisi*, with the knowledge that if they improperly returned a cheque of their customer's they rendered themselves liable to a serious action for damages.

Vaughan Williams, L.J., in giving judgment, said the position the bank took up was this: The order upon them was entituled *Koch, Judgment Creditor* v. *Mineral Ore Syndicate, Judgment*

Debtor, and the London and South Western Bank, Limited, Garnishees; and they said, "We have no such customer to whom we owe money deposited in our bank known as the Mineral Ore Syndicate, and we decline to act upon the order." True, they had a customer who thought fit to describe the partnership or business in which he was engaged as the Mineral Ore Syndicate, and true that a person drew cheques upon the bank on which appeared a name very similar to the name of the person who was mentioned in the garnishee order. But before the bank would treat this account as attached they wanted to be satisfied as to the identity of the account. The solicitors for the judgment creditor were so informed, and they took the order away to get it amended—first, as to the spelling of the name, and, secondly, by inserting into it the General Import Co.'s name. Master Wilberforce thought that no amendment was necessary, and that the bank should accept the order as a proper notice. What was the bank to do if cheques were presented to them for payment? They could hardly justify refusing to honour a cheque when they were uncertain whether the garnishee order served on them referred to that account at all. Master Chitty found that Julius Berckhardt, and Ernest Frederick Julius Berckhardt, the judgment debtor (trading as the General Import Co., and also trading as the Mineral Ore Syndicate), were one and the same. He considered the order required amendment, and accordingly he amended the order in these particulars; and his Lordship thought that was the proper course. It followed, therefore, that the order of A. T. Lawrence, J., must be reversed, and that of Master Chitty restored.

Judgment accordingly.

[IN THE COURT OF APPEAL.]

REX *v.* LOCKE *Ex parte* BRIDGE AND OTHERS.

1910. Reported. 27 Times L.R. 628. Journal, Vol. XXXII, p. 41.

Power of Local Authority to borrow on specific Security—Borrowing otherwise than on such Security—Implied Transfer of Security.

THIS was an appeal from a judgment of the Divisional Court (the Lord Chief Justice, Mr. Justice Bray, and Mr. Justice Pickford), which is reported 1910, 2 K.B., 201; the Journal of the Institute of Bankers, vol. XXXI, p. 342, discharging a rule *nisi* calling upon H. Locke, the auditor appointed to examine the accounts of the Corporation of Bournemouth for the financial year ended March 31st, 1909, to show cause why a writ of *certiorari* should not issue directed to him to remove into the High Court a certain certificate of disallowance and surcharge made by him for the sum of £2 12s. 6d. disallowed and surcharged upon G. E. Bridge and A. Youngman and A. Lickfold, which sum was part of a sum of £5,561 0s. 6d. paid to the National Provincial Bank of England, Limited, on or about October 29th, 1908. The rule was moved upon the ground that the sum disallowed, £2 12s. 6d., was interest upon a loan which the Corporation were authorized to borrow by sec. 233 of the Public Health Act, 1875, and was payable out of the district fund by virtue of sec. 207.

The facts were as follows:—

On April 3rd, 1900, the Local Government Board sanctioned a borrowing by the Bournemouth Corporation of the sum of £600, to be borrowed on the credit of the charges on rates, which the Corporation were entitled to mortgage, for the purpose of securing the repayment, together with interest, this amount to be repaid with interest within ten years from the date of borrowing thereof. In accordance with this sanction, on May 10th, 1900, the Corporation borrowed from the Wilts and Dorset Bank the sum of £600, and mortgaged a certain proportion of the rates, charges, and assessments as security for the said advance. In the month of February, 1902, arrangements were made for the transfer of the Corporation account to the National Provincial

Bank, and in pursuance of such arrangement the National Provincial Bank repaid the principal and interest due to the Wilts and Dorset Bank upon this, and a large number of other loans advanced on mortgage by the Wilts and Dorset Bank. The mortgages were not transferred to the National Provincial Bank, but receipts for the money were endorsed thereon. The terms of the arrangement with the National Provincial Bank were as follows:

"(1.) Interest to be Bank rate, with a *minimum* of 3½ per cent. and a *maximum* of 4½ per cent.

"(2.) The Corporation to undertake as soon as the advances have reached £250,000 or £300,000, if called upon so to do by the bank, to issue stock at such price as the bank may advise, not to be below 94 (on the assumption that the stock will be a trustee stock) the Corporation to bear the expenses of underwriting, whatever they may be.

"(3.) The banking account of the Corporation to be transferred to the National Provincial Bank.

"(4.) The stock to be issued through the National Provincial Bank, and that bank to be constituted registrars of the existing as well as future stock, assuming that future stock would be issued *pari passu* with and as one and the same stock as existing. The cost of issue to be as follows:—Underwriting (in present state of market), 1 per cent., with an additional ¼ per cent. to brokers; ¼ per cent. on all successful applications made by brokers; the bank fee would be ⅛ per cent. on nominal amount of stock offered; the brokers to make no charge for name appearing on prospectus or giving advice; brokers' charge for Stock Exchange quotation, £52 10s. 0d.; £200 to £250 advertising (this would be greatly at discretion of the Corporation); £80 to £100 printing, books and stationery; ⅛ per cent. Government duty on amount issued; annual costs of management by bank 1 per cent. on amount of each year's dividend, with a *minimum* of £50. For this the bank would keep the register, ask for the money necessary to pay the dividends, and prepare and pay the dividends as they came due.

"(5.) The bank would charge interest on moneys due to the bank only on the amount of the excess of sums borrowed over balances standing to the credit of the Corporation, the sum of £1,000 to £1,500 being allowed as a 'free balance' upon which no interest is to be allowed.

"(6.) The banking account to be opened in the name of the Mayor, Aldermen and Burgesses of the County Borough of Bournemouth, and to be operated upon by cheques signed by a member of the Council, the Borough Treasurer, and the Borough Accountant. In the temporary absence of the Borough Treasurer

from illness or other cause the sub-manager of the bank to be given authority to sign for him.

"(7.) The form of cheque to be used to be according to the specimen attached hereto."

The grounds of the surcharge were stated by the Auditor, in his certificate, to be the following:—

"(1.) Because on the evidence before me the Town Council have borrowed moneys without giving any proper security for the sums advanced.

"(2.) Because moneys borrowed by the Council under the provisions of sec. 233 of the Public Health Act, 1875, to defray expenses incurred by them in the execution of the Act can only be borrowed on the credit of the fund or rate out of which the Council are authorised to defray such expenses.

"(3.) Because the borrowing powers of the Council are subject to statutory conditions, and in dispensing with the whole or any part of such conditions they are acting contrary to law, and any payment of interest on moneys borrowed without the fulfilment of the statutory conditions in that behalf is illegal—Attorney-General *v.* De Winton, 1906, 2 Ch., 106.

"(4.) Because the Council have no expressed or implied authority to borrow moneys other than in the manner authorised by statute—Reg. *v.* Sir C. Reed, 5 Q.B.D., 483.

"(5.) Because there is no authority in law for the payment of interest on moneys borrowed in the manner here adopted and on which interest purports to have been paid."

It appears advisable to give the judgment of the Divisional Court practically in full. As will be seen from the judgment of the Court of Appeal, that Court in no way dissented from the general principles laid down in the Court below, which therefore remain as an effective exposition of the law. The only ground on which the Court of Appeal reversed the decision of the Divisional Court was that they held, contrary to what had been decided below, that the transaction with regard to the £600 and presumably the other loans regularly incurred with the Wilts and Dorset Bank constituted a transfer of those loans and all rights relating thereto to the National Provincial Bank.

After stating the facts, the Lord Chief Justice said as follows:

The question raised, and on which the parties desire a decision, is whether the payment of interest to the bank in respect of loans made by the bank, for which no security has been issued, is legal. The question turns almost entirely upon certain provisions of the Public Health Act, 1875. It was contended, on behalf of those who objected to the surcharge, that under sec. 233 of the

Public Health Act, 1875, provided the sanction of the Local Government Board has been given to a loan, the local authority may borrow the money in any way they please, and are not bound to give any security in respect of the money so borrowed. It was contended, upon the authority of Julius *v.* Bishop of Oxford, 5 App. Cas., 214, 235, that the use of the words "may mortgage" in the second paragraph of the section left it quite optional to the local authority whether they would give a mortgage or not, and that if they could arrange for the advance of the money without giving security it was within their power to do so. To a certain extent we agree with this argument. The powers of borrowing with the sanction of the Local Government Board include the borrowing of money for the purpose of defraying any costs, charges, or expenses incurred, or to be incurred, by the local authority in the execution of the Sanitary Acts or of the Public Health Act, and if the transaction objected to was merely the payment of interest upon some temporary loan obtained for temporary purposes until other moneys—as, for instance, rates or moneys agreed to be advanced—were in fact received, we agree that it might not be necessary under such circumstances for the local authority to give security. We refer to the judgment of this Court in Smith *v.* Southampton Corporation, 1902, 2 K.B., 244, and particularly the passage in our brother Channell's judgment on page 254, in which we entirely concur:—"Nothing that I am saying, and nothing that my lord has said, is to be taken as in any way suggesting that there would be anything wrong in the course which must practically always be taken—that is, in raising temporary loans within the limits of the borrowing powers in respect of matters which require to be paid quickly, the local authority intending at some future date to raise one large loan by an issue of stock, and having necessarily to incur some small expenditure before the loan is raised; obviously a temporary loan from the bankers for such a purpose would stand upon a very different footing from what has been done here."

The case with which we have to deal is not one of the class there mentioned. The arrangement of March 25th was an agreement by the bank to finance up to £500,000 at a *minimum* rate of interest of 3½ per cent. and *maximum* of 4½ per cent., and the Corporation agreed, if called upon, as soon as the advances reached £250,000, to issue stock at not less than 94, the consideration of the arrangement being the transfer of the Corporation bank account to the National Provincial Bank. In our opinion this cannot be regarded as merely a temporary arrangement within the class of case to which we have referred. It seems to us to be an exercise of borrowing powers for the purpose of permanent loans to be repaid by instalments. The question,

then, whether "may" is to be read as giving the local authority a discretion as to whether they would issue a mortgage or not, does not, in our opinion, afford the true test by which the case is governed. Sec. 233 of the Public Health Act, 1875, gave power to borrow on mortgage. Sec. 234 contains important regulations as to the exercise of borrowing powers. Secs. 236, 237, and 238 provide for the register and transfer of mortgages, and it seems to us that the object of these sections is that intending lenders and ratepayers may be able to ascertain what is the existing position of the Corporation in the matter of moneys they have borrowed. This protection would be entirely frustrated if loans for amounts which really represent the principal of all the advances sanctioned could be carried out by an arrangement of the kind suggested. The Local Loans Act of 1875 provides another method of obtaining loans by means of debenture stock, certificates, etc., and important provisions are again made as to registration and as to the regulations under which such securities may be issued, and, again, sec. 5 of the Public Health Act, 1890, provides for the creation of Corporation stock. In all these cases the consent of the Local Government Board is required, and in our opinion that consent does not merely involve the consent to the loan, but an approval of the way in which the loan is to be secured according to the Act of Parliament under which the securities are issued. This is a case, therefore, of action by an authority that has limited powers, of which limited powers the public are assumed to have notice. Under the circumstances we are unable to construe the words in the opening part of the second paragraph of sec. 233 as giving the wide powers which it was contended that they conferred in respect of a transaction which is in reality the exercise of the borrowing powers to extend over many years and in respect of advances which are to be repaid in different terms of years. By such an arrangement all the safeguards for the protection of ratepayers and possible lenders by notice, registration, and otherwise of previous loans are disregarded. As regards the authorities, there is no case that raises the exact point argued in this case, but it seems to us that the principle which underlies the decisions in Reg. *v.* Reed, 5 Q.B.D., 483, and The Attorney-General *v.* De Winton, 1906, 2 Ch., 106, supports the view which we have taken. It was attempted to justify the payment upon the ground that the National Provincial Bank were entitled to stand in the shoes of the Wilts and Dorset Bank and be treated for the purpose of this surcharge as though they were transferees of the particular mortgage which secured the £600 advanced by the Wilts and Dorset Bank. No such point appears to have been raised before the auditor. As a matter of fact the mortgages were surrendered to the Corporation and were not in existence at the time when

the payment was made, so that in our opinion this contention cannot be allowed to prevail under the circumstances of this case. The rules must be discharged with costs.

Rules discharged accordingly.

G. E. Bridge and others appealed.

The Court allowed the appeal.

Lord Justice Vaughan Williams, in delivering judgment, said that he thought that he had not to decide the question which had been dealt with by the King's Bench Division. He might say that if he had had to decide that question he should have come to the conclusion that this borrowing was not at any stage a borrowing for temporary purposes. He thought that that meant borrowing under conditions which were discussed in Smith *v.* Southampton Corporation, 1902, 2 K.B., 244. It would be seen from the judgment in that case that the decision there turned on a question very remote from what had been submitted in argument here as to what would constitute a temporary loan for temporary purposes. There was no suggestion that it was a temporary loan here. This case really turned on a very different matter. It was quite plain on the admitted facts that the original intention of the parties was not that the old debt to the Wilts and Dorset Bank should be blotted out and a new loan obtained from the National Provincial Bank; on the contrary, it was perfectly manifest on the antecedent correspondence that the original intention of the parties was that there should be a transfer of the loan, not that a new loan should be created. It was simply an assignment of the debt and of the mortgage securing it. But it was said that if you looked at the pass-books and the accounts and saw how the matter had been carried out it would be seen that the National Provincial Bank had lent a sum of money to the corporation, that it was a new borrowing, and that with the money thus obtained the corporation had paid off the debt due to the Wilts and Dorset Bank. He agreed that looking at the pass-books you might find in form that that had happened; but he was of opinion that that was mere machinery. In substance the transaction which took place was a transfer of the debt and of the mortgage securing it. The form in which it was carried out did not alter the effect of the transaction. He thought it was plain on the facts that the mortgage documents and the sanction by the Local Government Board for creating additional stock were intended to pass to the National Provincial Bank and were in fact tendered to them, but they said they did not desire to have mortgages. That, however, did not alter the substance of the transaction. He thought, both on the documents and on the admitted facts, it was quite clear that there had been

no new lending by the National Provincial Bank to the corporation and no new borrowing by the corporation from that bank. It was merely a transfer of the old debt and of the security. That being so, and there being a sanction for the old loan and a security for the same, in his opinion the certificate of disallowance and surcharge could not be justified. He did not propose to discuss at length the effect of sec. 233 of the Public Health Act, 1875. He thought it was a very difficult question in a case where a proper sanction had been obtained for the original borrowing or reborrowing whether it was necessary to take a security in order to make the loan legal. In his judgment there had been no reborrowing here; it was merely a transfer of the old loan. Under those circumstances he thought there was no reason for the surcharge and the appeal must be allowed.

Lord Justice Buckley and Lord Justice Kennedy also delivered judgment allowing the appeal.

Appeal allowed.

Note.—As before stated, this judgment does not impugn the propositions laid down by the Divisional Court.

The case must be read in connection with Attorney-General *v.* De Winton, *ante*, p. 106, London and Provincial Bank *v.* Tottenham Urban District Council, *ante*, p. 206, Tottenham Urban District Council, 73 J.P., 437, Attorney-General *v.* Corporation of West Ham, *ante*, p. 254.

It will be noticed that none of the cases directly deals with the position of a bank or other party who has advanced money by way of overdraft or otherwise to a local authority in circumstances which render such borrowing *ultra vires* on the part of the authority. There are, however, definite rulings in or obvious deductions from the cases which have an important bearing on the question. They are as follows:—

The funds of local authorities are trust funds.

The fact that they are trust funds is presumed to be within the knowledge of all persons dealing with those authorities.

Overdrawing is borrowing.

An *ultra vires* loan cannot be recovered.

Repayment of an *ultra vires* loan is as much *ultra vires* as the loan itself.

Moneys coming to the lender's hands cannot be retained as against an *ultra vires* loan.

Where borrowing is authorised in a specific manner or on specified security, this excludes any implied right to borrow otherwise, even without security, save possibly in small amounts for a temporary purpose.

Where a local authority has distinct borrowing powers in respect

of its various undertakings, the accounts must be kept and dealt with separately. Loans or overdrafts in connection with one cannot be discharged or reduced out of moneys appropriated to another, or, apparently even out of moneys available for general purposes.

In certain cases, the doctrine of subrogation may be invoked, and justify retention against, or even recovery of, moneys irregularly borrowed, but applied in the liquidation of previous properly incurred obligations.

The passage in the judgment of Channell, J., in Smith *v.* Southampton Corporation, 1902, 2 K.B., 244, referred to by the Court of Appeal in Rex *v.* Locke is as follows:—"Nothing that I am saying and nothing that my lord has said is to be taken as in any way suggesting that there would be anything wrong in the course which must practically always be taken, that is, in raising temporary loans within the limits of the borrowing powers in respect of matters which require to be paid quickly, the local authority intending at some future date to raise one large loan by an issue of stock, and having necessarily to incur some small expenditure before the loan is raised; obviously a temporary loan from the bankers for such a purpose would stand upon a very different footing from what has been done here."

This view is not of universal acceptance. For instance, in "Chambers *v.* Manchester and Milford Railway Company, 5 B. and S., at p. 609, Crompton, J., said:—"As to the point whether the prohibition against borrowing extends to the overdrawing by the company of the account at their bankers to a small extent for the immediate necessities of the company, I think that if a company were permitted to overdraw to a small amount there is no reason why they should not do so to any extent to which their credit would reach."

In any event the protection must be limited and dealings in reliance thereon conducted with caution.

[IN THE COURT OF APPEAL.]

WALKER *v.* CAPITAL AND COUNTIES BANK, LIMITED, AND SELMES, JACKSON, AND GULLAND.

1910. Reported in the Times, Dec. 16th, 1910. Journal, Vol. XXXII, p. 44.

Hypothecation of Crops—Registration as Bill of Sale.

THIS was an appeal by the plaintiff from a decision of the Lord Chief Justice in an action tried by him without a jury, reported in The Times of July 28th, 1910. The action was brought by the trustee of the property of one J. A. Partridge, deceased, whose estate was being administered in bankruptcy, against the Capital and Counties Bank and Selmes, Jackson, and Co. in the following circumstances:—

J. A. Partridge was a farmer, and on August 30th, 1909, he wrote to the defendant bank the following letter:—"In consideration of your making further advances to me to assist me in getting in and marketing this season's hop crop, I agree to employ Messrs. Selmes, Jackson, and Gulland as factors to sell the same, and to repay you in the first place the amount of such advances for the time being, and subject thereto to repay themselves the amount due in respect of their loan to me of £500, and to pay you the ultimate balance of the proceeds, to be placed to the credit of my general account at your branch, and to be applied in reduction of my general indebtedness to you."

On the same date he wrote to the other defendants:—"I hereby authorize and request you to sell my present season's hop crop, and in consideration of further advances to be made to me by the Capital and Counties Bank, Limited, at your request to enable me to get in and harvest the said crop, I further authorize and empower you to hold the crop on their behalf, and to apply the net proceeds of sale as follows—viz., in the first place in repaying to them the amount of such advances for the time being for picking, drying, and packing the said crop, and in the next place in repaying yourselves the amount already advanced by you to me, and subject thereto, I request and empower you to pay the ultimate proceeds to the said bank, to be placed to the credit of my

general account and applied in reduction of my general indebtedness to the said bank."

These documents the plaintiff alleged constituted a bill of sale and were void for non-registration and non-compliance with the provisions of the Bills of Sale Acts.

The Lord Chief Justice held that the documents were not a bill of sale within sec. 4 of the Act of 1878, as enlarged by the Act of 1882, and gave judgment for the defendants.

Lord Justice Vaughan Williams said that a number of interesting questions had been argued on this appeal, but in the view which he took of the case it was not necessary to express any opinion on those questions. On the true meaning of the letters, they constituted an equitable assignment—not of the growing hops, but an equitable assignment of the moneys to be realized by the sale of the hops. There was therefore no bill of sale, but a mere assignment of a chose in action. The appeal must be dismissed.

Lord Justice Buckley and Lord Justice Kennedy delivered judgment to the same effect.

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October, 1911.